Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

LILLIAN BLINDER AND THE LILLIAN BLINDER TRUST and MEYER BLINDER,

Co-Petitioners,

v.

DAN H. HOXWORTH; named Dan Hoxworth; Louise A. Hoxworth; named, Louise Hoxworth, individually and LOUISE HOXWORTH, individually and on behalf of the Hoxworth Class,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals rendered a decision in conflict with a decision of its own circuit, another United States Court of Appeals and the Supreme Court's prior rulings on the same important legal matter of application of *res judicata* to parties to a bankruptcy settlement where such parties later attack the judgment in a declaratory judgment proceeding.

2. Whether the court of appeals' neglect to review a material issue of the respondent's party status raised by the petitioners on appeal was an intentional deprivation of due process of law which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory powers.

3. Whether the court of appeals sanctioned the departure of the district court from the accepted and usual course of judicial proceedings so as to call for the exercise of the Supreme Court's supervisory powers where it ratified and repeated the district court's neglect to review the material issue of the respondent's party status as it applied to the doctrine of res judicata.

LIST OF PARTIES

Lillian Blinder and the Lillian Blinder Trust, and Meyer Blinder were the defendants in the District Court proceeding and appellants below. Dan and Louise Hoxworth individually and on behalf of the Hoxworth Class were plaintiffs in the District Court and the sole appellees below. Robert D. Clark, Esq., Assistant U.S. Attorney for the District of Colorado, requested service of all filings however, the party whom he originally represented in the District Court, Bradford Bolton, Clerk of the Bankruptcy Court for the District of Colorado, along with several other parties in the District Court did not appear in the appeal.

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LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 20, 24

OPINIONS BELOW

Review is sought of the published opinion of the United States Court of Appeals for the Tenth Circuit dated January 22, 1996, *infra* at 1a-12a, reported at 74 F.3d 205. The Memorandum and Order of the District Court which was appealed, *infra* at 13a-27a, is reported at 170 B.R. 438.

JURISDICTION

The court of appeals entered its judgment on January 22, 1996. Petitioners timely filed separate petitions for rehearing incorporating additional suggestions for rehearing *in banc* which were denied by the court of appeals on March 28, 1996. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The obligation of the court of appeals to enforce the Fifth Amendment to the U.S. Constitution is at issue in this Petition for Certiorari. The Fifth Amendment provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

(App. 37a.)

STATUTORY PROVISIONS INVOLVED

The statutes involved are all statutes enacted under Title 28 of the United States Code: 28 U.S.C. 1254, 1291, 1294, 1331, 1332, 1346, 1963, 2041, 2042 appearing at App. 38a through 42a.

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the Court of First Instance

The basis for federal jurisdiction in the court of appeals for hearing an appeal from the district court is 28 U.S.C. 1291 and 1294. (App. 38a.) The district court cited numerous bases for jurisdiction, including 28 U.S.C. 1331, 1332, 1346, 1963, 2041, and 2042. (App. 38a-44a.)

B. Nature of the Case

This case is a plea to review an opinion of a court of appeals concerning the claim preclusion doctrine of res judicata where the court of appeals failed to apply its findings to existing precedent which caused a deprivation of petitioners' due process of law, a ratification of an extra-jurisdictional declaratory judgment which defeated the terms of a prior final judgment on the merits involving identical claims and identical parties, and destruction of the benefits which one of the petitioners was supposed to derive from such judgment.

STATEMENT OF FACTS

A. Proceedings Below

Your petitioners in this case are Meyer Blinder, and Lillian Blinder and the Lillian Blinder Trust, ("Lillian Blinder") also collectively referred to as the Blinders. The respondents in this case are Dan and Louise Hoxworth, individually and as members of the Hoxworth Class, ("Hoxworth plaintiffs"). The petition addresses a single opinion of the U.S. Tenth Circuit Court of Appeals issued in response to two separate appeals filed by the Blinders in that court.

The proceedings below concerned the primary issue of whether res judicata precluded the district court from exercising its jurisdiction to grant the Hoxworth plaintiffs declaratory relief by awarding them an interest in assets which were previously awarded to Lillian Blinder in a prior final judgment on the merits to which both the Blinders and the Hoxworth plaintiffs were parties. (App. 6a, 57a, 65a, 66a, 69a.)

On January 10, 1992 a bankruptcy court entered a partial summary judgment against the Blinders ordering them to transfer to the bankruptcy trustee all of their individual and joint property whether directly or indirectly owned and wherever located. (App. 16a.) On February 4, 1992 the assets were transferred into the bankruptcy court registry to be held in lieu of a supersedeas bond. *Id.*

On March 12, 1992, a final default judgment was entered by the bankruptcy court declaring that all of the

Blinders' assets were property of the bankruptcy estate and were being held in custodia legis. (App. 17a.)

On August 12, 1992, the trustee entered into a settlement agreement with the Blinders while the bankruptcy court judgments against the Blinders were on appeal. *Id.* The settlement agreement provided, *inter alia*, that Lillian Blinder would drop all claims against the trustee, which included her appeal, in exchange for the trustee's granting her ownership of certain estate assets identified in the agreement. (App. 50-51a.) The agreement further provided that Meyer Blinder would surrender his claim to the return of any of his seized assets but that he would be relieved of the deficiency balance of the default judgment in exchange for dropping his claims against the trustee including his separate right of appeal. (App. 49a-51a.)

The settlement agreement was approved over the Hoxworth plaintiffs' objection and on September 4, 1992, the Hoxworth plaintiffs appealed the order approving the settlement. (App. 5a, 60-62a.) At that time two cross-injunctions from two federal courts, based upon a default judgment procured by the trustee against the Blinders and a default judgment procured by the Hoxworth class in the Eastern District of Pennsylvania against Meyer Blinder alone, subjected all parties to inconsistent obligations and claims against the Blinders' assets. (App. 6a, 17-18a.)

On September 21, 1992, the trustee and the Hoxworth plaintiffs reached their own settlement agreement where the Hoxworth plaintiffs agreed to release the trustee from the injunction of the Pennsylvania district court to allow the trustee to effectuate the terms of his settlement with

the Blinders and to drop their appeal of the Blinder settlement as a condition of their own settlement. (App. 18a.) In return the Hoxworth plaintiffs were permitted to assert a $30 million proof of claim previously opposed by the trustee. *Id.*

The Blinders were creditors of the bankrupt's estate at the time they settled with the trustee, having filed claims for unpaid debts owed them by the bankrupt and having filed a counterclaim in the trustee's adversary proceeding leading to the first default judgment. (App. 54-55a.) *See* also *In re Blinder Robinson & Co., Inc.*, 35 B.R. 892, at 895, 896 (D.Colo.1991).

The Hoxworth class waited several months and in June of 1993 sued Lillian Blinder and the Lillian Blinder Trust, seeking a declaratory judgment to enforce a lien in execution of a separate default judgment against Meyer Blinder on the same assets which were abandoned by Meyer Blinder in August of 1992 in the settlement, and which were to be distributed to Lillian Blinder according to the terms of the settlement. (App. 2a.)

The Blinders asserted in each lower court, the affirmative defense that the centuries old doctrine of res judicata precluded the district court from exercising its jurisdiction to entertain a declaratory judgment proceeding which sought to relitigate the terms of the bankruptcy-court approved settlement where the parties or privies to the declaratory proceeding were identical to the parties or privies to the settlement agreement and where the party initiating the declaratory proceeding

sought an adjudication of a right to identical assets disposed of in the settlement agreement. (App. 6a, 57a, 65a, 66a, 69a.)

Meyer Blinder raised a very specific issue that the undisputed facts of the conduct of the Hoxworth plaintiffs during the bankruptcy court proceedings proved that they were parties to the settlement. (App. 73-74a.)

In its published opinion, the district court properly recited the legal syllogism employed by the 10th Circuit Court of Appeals for finding claim preclusion. (App. 20a.)

When it next applied the doctrine to the bankruptcy context, the district court cited the controlling precedent of the First Circuit opinion in *In Re Medomak Canning*, 922 F.2d 895, 900 (1st Cir.1990) in support of its legal conclusion that within the bankruptcy context, an equitable lien against a bankruptcy estate is barred by res judicata if the lien holders fail to assert their liens upon notice of settlement between the trustee and various creditors of the bankruptcy estate. (App. 20a.)

The district court next distinguished *Medomak, supra,* from the instant case by finding against contradictory evidence in the record and the findings of fellow federal judge John Kane in *In re Blinder, Robinson & Co. Inc., supra,* that petitioner Lillian Blinder was not given assets as a creditor and therefore res judicata did not apply. *Id.* The district court neglected to address whether Meyer Blinder was also a creditor and whether res judicata barred relitigating his surrender of his assets to the bankruptcy estate, while describing him as a party. (App. 20a.)

The Blinders submitted portions of the stipulated record from the declaratory judgment proceeding to the court of appeals as part of their joint appendix. The contents thereof proved that the Blinders were creditors of the bankruptcy estate; (App. 55-56a.) that the Hoxworth plaintiffs exercised their right to object to the settlement; (App. 60a.) filed notice of appeal of the order approving the settlement agreement; and abandoned their appeal as a condition of their own settlement agreement with the bankruptcy trustee. (App. 6a.)

Meyer Blinder and later Lillian Blinder repeated their contention in the court of appeals that the Hoxworth plaintiffs were parties to the settlement agreement for purposes of the application of the doctrine of res judicata, and therefore were precluded from raising the claims in the declaratory judgment proceeding which were previously resolved or which could have been resolved during the approval and appeal process of the Blinder settlement. (App. 57a, 65a, 66a, 69a.)

The court of appeals followed the form of incomplete review established in the district court by neglecting to address the fact that the Hoxworth plaintiffs were parties to a proceeding resulting in a final judgment on the merits and opted instead to analyze the Hoxworth plaintiffs' privity status vis-a-vis the trustee, finding that although they were in privity with the trustee res judicata did not apply due to an exception set forth in the Restatement (Second) of Judgments § 42(1)(d). (App. 7-8a.)

Both the court of appeals expressly and the district court implicitly found that the other two elements of res

judicata were met – a prior final judgment on the merits and identical claims. (App. 7a, 20a.)

The petitioners moved for rehearing in the court of appeals for several reasons, including the reason that the Hoxworth status as a party to the settlement, coupled with the court of appeals agreement that the other two elements of res judicata were met, required it to vacate the judgment of the district court in order to maintain uniformity with 10th Circuit and U.S. Supreme Court law of res judicata. (App. 65-67a; 69-70a.)

The petition was denied on February 28, 1996 without addressing the party status of the Hoxworth plaintiffs. (App. 35-36a.)

REASONS FOR GRANTING THE WRIT

Rule 10 of this Honorable Court as applied to the nature of this petition generally limits review under a writ of certiorari to cases where a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory powers. Each of these bases for granting review is discussed separately below.

I. THE COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH A DECISION OF ITS OWN, ANOTHER UNITED STATES COURT OF APPEALS, AND THIS HONORABLE COURT'S PRIOR RULINGS ON THE SAME IMPORTANT LEGAL MATTER.

The decision of the court of appeals is compared and contrasted with the cases it cites on the important matter of the application of res judicata. This Honorable Court has recognized the application of res judicata as an issue of suitable importance for exercise of its power of review several times and most recently in 1979 and 1980 rulings discussed below.

The court of appeals relies primarily upon one of the recent Supreme Court cases as the source of authority defining the elements of the legal syllogism supporting res judicata, *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414-415, 66 L.Ed.2d 308 (1980), affirming that under res judicata a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. (App. 7a.)

The court of appeals further refined its definition of the elements of res judicata quoting one of its own previous published opinions as follows.

> To prevail on a defense of res judicata a defendant must establish: (1) a final judgment on the merits in the prior action, (2) the claims raised in the subsequent action were identical to those decided in the prior action, and (3) the prior action involved the same parties or their privies.

Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1467 (10th Cir.1993).

(App. 7a.)

A. The Court of Appeals' Error of Law Recognizing Dual Status of Parties and Privies in Identical Person Contravenes its own precedent, First Circuit precedent, and U.S. Supreme Court precedent.

The court of appeals created an original exception to the application of res judicata which in effect grants a party the right to disavow his party status at will to avoid claim preclusion where the two other elements of the doctrine are established.

The court of appeals does expressly and implicitly reach the factual conclusion that the Hoxworth plaintiffs are parties to former judgment:

> 1) the Hoxworth Class filed an unsecured proof of claim against the . . . estate. (App. 5a.)
>
> 2) the Hoxworth plaintiffs, creditors of the estate, appealed the bankruptcy court's approval of the . . . Blinder Settlement because the terms were not in the interest of the estate and its creditors. (App. 5a.)
>
> 3) The Hoxworth class agreed to dismiss its appeal of the Blinder Settlement and to modify an injunction the Pennsylvania court had placed over Meyer Blinder's assets to allow the trustee to proceed with the Blinder Settlement. (App. 6a.)
>
> 4) Until the Hoxworth settlement was reached, the trustee and the Hoxworth Class

> were in a standoff – each party enjoined from enforcing their respective judgment over the Blinder assets. (App. 8a.)

The last statement, that each *party* was enjoined from enforcing its judgment, is an express finding that the Hoxworth plaintiffs *were* parties to the bankruptcy proceedings, and is inconsistent with a finding that res judicata did not bar relitigation of the terms of the settlement agreement.

With regard to the Hoxworth plaintiffs' status as parties this Honorable Court has addressed the issue of bankruptcy court jurisdiction over creditors, including jurisdiction over creditors who are sued for preference actions, and has concluded that such creditors are subjected to the bankruptcy court's equitable powers and its process of allowance and disallowance of claims. *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S.Ct. 330, 331; 112 L.Ed. 343 (1990). The court of appeals opinion implies that creditors are not always subject to the process of allowance and disallowance of claims.

According to the court of appeals, res judicata precludes relitigation of claims which were or could have been raised in a prior proceeding involving identical claims and identical parties or privies, however if a party to the first proceeding takes a position adverse to other parties in that proceeding and loses and abandons his right of appeal, he may disregard his party status and may relitigate his claims on a theory that he was in privity with the other parties but is not bound by the judgment, because the other parties did not represent his interests.

The court of appeals relies upon Restatement (Second) of Judgments, § 42(1)(d) to support this theory. (App. 8a.) The Restatement provides that a *person* is not bound by a judgment for or against a party who purports to represent him if with respect to his status as a member of the class and the party's status as the representative of the class, there was such a substantial divergence of interest between the party and the members of the class that the party could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked. (App. 46-47a.)

Meyer Blinder noted in his Petition for Rehearing Restatement (Second) § 42(1)(d) is an exception to § 41 of the Restatement which defines the circumstances under which a non-party will be bound by a judgment as though he were a party. (App. 75a.) Section 41(1) provides that a person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. (App. 45a.) Section 41(2) provides that a person represented by a party is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to the service of process. (App. 46a.)

The exception to § 41 set forth in § 42(1)(d) assumes that the person who is bound by res judicata was in privity and was not a party to the prior proceeding because § 41(1) clearly applies to *non-parties*. By relying on the exception to § 41 set forth in § 42(1)(d) the court of appeals implicitly found that the Hoxworth plaintiffs

were not parties to the settlement although it contradicted that finding in other portions of its opinion addressed above.

Section 34 of the Restatement should have been applied to enforce res judicata. It provides that a person who is named as a party to an action and subjected to jurisdiction of the court is a party to the action. (App. 45a.) The same principle is incorporated into *Langenkamp v. Culp, supra.* The Hoxworth plaintiffs were named and subjected themselves to the jurisdiction of the court. They contested and appealed the Blinder settlement in a direct (party) capacity not as privies relying on another party to represent their interests.

After the Hoxworth plaintiffs elected to represent themselves directly and confront the position of the trustee and the Blinders regarding the Blinder settlement the policies embodied in § 42(1)(d) had no application to their circumstances.

The obvious policy underlying the exception to privity binding non-parties to final judgments as contained in § 42(1)(d) is to protect non-parties from being subjected to judgments where they did not represent themselves at the proceedings (because privies are defined as non-parties) and where the party representing them did not protect an interest which they possessed which was adverse to such party.

Under the logic employed by the court of appeals there can be no finding of res judicata between parties to a prior final judgment on the merits where such parties

have previously litigated interests which cannot be represented by their adverse parties. The holding allows parties to arbitrarily designate themselves as non-parties after failing to get their way in the first contested proceeding and to recharacterize themselves as privies in order to pursue a second lawsuit and thereby successfully avoid claim preclusion. That is precisely what the Hoxworth plaintiffs accomplished below.

The opinion of the court of appeals thus eliminates claim preclusion in all cases where there is an adversity of interest between parties in the first proceeding, provided they can interject some colorable claim that they were privies while litigating their claims against the other parties to that proceeding. The only way to raise such a claim is to disavow party status, yet the only way to contest the claim directly in the first proceeding is to become a party. Now in order to be assured of a second bite at the apple parties to the first proceeding should vigorously contest the first final judgment on the merits against other parties and simply deny party status if they are dissatisfied with result and do not wish to risk an appeal.

This conclusion overrules Supreme Court precedent in *Allen v. McCurry, supra; Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed. 210 (1979), and 10th Circuit precedent in *Satsky, supra,* by changing the "parties or privies" component to "parties who later disavow their party status and arbitrarily claim they were in privity with a party who failed to represent their interests". The conclusion further violates the 1st Circuit precedent in *In Re Medomak, supra,* which incorporated the

unaltered formula articulated for res judicata by this Honorable Court in *Allen v. McCurry, supra.*

B. Error of Law In Contradicting Own Legal Conclusion Re: Identity of Claims

In a related error of law, the court of appeals overruled its own conclusion that the Blinder settlement and the declaratory proceeding involved an identical claim – rights to the $1.8 million in Excluded Assets. (App. 7a.) The same panel later finds that

> [t]he trustee essentially abandoned the Excluded Assets to the Lillian Blinder trust. Consequently the bankruptcy court declined to assert jurisdiction over the assets and to decide the relative rights, claims, and interests of competing claimants to property which, in its view, appeared not to be part of the debtor's estate. (App. 12a.)

In order for the trustee to abandon assets he had to have control over them in the first place. In order for the bankruptcy court to approve the distribution of the assets and approve the final surrender of Meyer Blinder's assets already in its custody it had to possess jurisdiction over the assets to enforce its own orders regarding their distribution.

The court of appeals' conclusion that the assets were abandoned and not part of assets of the estate distributed to a creditor, implicitly assumes that the bankruptcy court had no jurisdiction over the assets at the time it approved the settlement and therefore no jurisdiction to enforce its order awarding them to Lillian Blinder. However, the

assets were in the court's actual and constructive possession since February and a bankruptcy court has exclusive jurisdiction to determine claims to property in its actual and constructive possession. *In Re Odell Const. Co.*, 119 F.Supp. 578, 580 (D.Colo.1954).

The court of appeals finding that the claims which the Hoxworth plaintiffs asserted against Lillian Blinder in the settlement proceeding were identical to the claims which they asserted in the declaratory judgment and but for a lack of privity would have been barred, cannot be reconciled with a finding that the assets were not subject to the bankruptcy court's jurisdiction. The claims could not be both within the jurisdictional purview of claim preclusion in the first proceeding and outside of the jurisdictional purview of claim preclusion in the second proceeding if indeed they were identical.

If the Hoxworth plaintiffs genuinely believed that the assets were not under the control of the bankruptcy court subject to its decision on how to distribute those assets to creditors of the estate, why did they contest and appeal a proposed distribution to Lillian Blinder and a proposed surrender of Meyer Blinder's right to recover the assets seized from him months before.

Assuming Meyer Blinder's surrender of all assets to the estate was binding as part of the final judgment on the merits embodied in the settlement agreement he had no assets from the date of their confiscation in February of 1992 forward. Without such assets there were no Meyer Blinder assets in 1993 which could be traced to satisfy the district court's declaratory judgment anywhere other than into the bankruptcy court's legal custody subject to

enforceable court-approved distributions contained in its court-approved settlement agreements.

By allowing the Hoxworth plaintiffs to claim declaratory relief by tracing assets which Meyer Blinder surrendered to the trustee the court of appeals also authorized them and any other person similarly situated in the circuit to bring declaratory judgment proceedings against every creditor of the bankruptcy estate who received a distribution of assets formerly belonging to Meyer Blinder, thereby defeating the finality of the trustee's entire scheme of settlement of estate claims. The inconsistent logic indulged in by the court of appeals concerning the identity of the claims is not recognized as existing law in the American system of jurisprudence.

II. THE COURT OF APPEALS ELECTION TO NEGLECT REVIEWING A MATERIAL ISSUE RAISED BY THE BLINDERS ON APPEAL WAS A DEPRIVATION OF DUE PROCESS WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWERS

The court of appeals deprived the Blinders of due process of law guaranteed by the Fifth Amendment to the U.S. Constitution by intentionally failing to address *all material* issues raised on appeal. An accepted and usual course of judicial proceedings described in Rule 10 of this Honorable Court as applied in this case is found in the court of appeals recognition that it was bound to conduct a *de novo* review of the district court's decision. (App. 6a.) In stating that it was bound to review the case de novo

the court of appeals bound itself to its prior rulings on the process for conducting the review. Tenth Circuit precedent defining the process for de novo review requires the appellate court to review the record in light of its own independent judgment without giving special weight to the prior decision. *U.S. v Brian N.*, 900 F.2d 218, 220, (10th Cir. 1990).

The facts from the record below which supported a finding that the Hoxworth plaintiffs were parties to the settlement agreement were ignored by the district court and later ignored by the court of appeals. It appears that the district court's decision to ignore those facts was given special weight in the appellate opinion as the appellate court chose to ignore the identical facts and declined to apply them to the legal issue raised contrary to the law of *U.S. v. Brian N., supra.*

The court of appeals' disregard of its own precedent defining the process it applied was further aggravated by its neglect to address anew the district court's conclusion of law that Lillian Blinder and/or the Hoxworth plaintiffs were not parties to the bankruptcy settlement.

Supreme Court Rule 10 makes it clear that review is rarely granted and errors of fact or misapplication of a properly stated rule of law by a court of appeals will not *per se* constitute grounds for accepting certiorari. However, where such errors and misapplication of law also involve deprivations of due process it appears that the supervisory powers of the court should be exercised.

A. Deprivations of Due Process v. Denials of Due Process

One of the most noted experts on Constitutional Law, Harvard Professor Laurence H. Tribe, has aptly described the analytical model for determining whether the due process errors of lower courts are deprivations of due process which should be corrected by intervention of this Honorable Court or whether they are mere denials of due process not subject to compulsory review. His analysis based upon various Supreme Court precedent reconciles the portions of Rule 10 addressing departures from the accepted and usual course of judicial proceedings as they conflict with the portions addressing the proposition that mere errors of law and fact will not suffice to cause this Honorable Court to grant review.

> The fifth amendment commands the federal government: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "
>
> . . . These procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action. The Supreme Court has analogized due process to the Magna Carta's "guarantees against the oppressions and usurpations" of the royal prerogative, in support of the basic conclusion that due process "is a restraint on the . . . judicial powers of the government, and cannot be so construed as to leave (government) . . . free to make any process "due process of law" by mere will."

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 664 (2d ed. 1988)

The facts which determine whether the Blinders were deprived of due process must support the conclusions that the court of appeals used *any* process as due process of law and in so doing used less process than the Blinders were constitutionally entitled to.

> [G]overnmental omissions that cause loss of . . . property, but are not the result of *intentional* governmental choices or policies, do not necessarily entail *"deprivations"* without due process.
>
> * * *
>
> Mere negligence of an official, then, does not implicate a due process violation.

Id., at 664, 665.

Professor Tribe addresses important aspects of the question of how to determine whether due process deprivations are intentional in his comments on two alternative approaches to explaining the policy underlying the right of due process.

> One approach begins with the proposition that there is *intrinsic* value in the due process right to be heard, since it grants to the individuals or groups . . . the chance to participate in the process by which those decisions are made, an opportunity that expresses their dignity as persons.
>
> * * *
>
> A second, more *instrumental* approach views the requirements of due process as constitutionally identified and valued less for their intrinsic character than for their anticipated consequences as a means of assuring that the society's

> agreed upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed.

Id. at 666, 667.

Applying the intrinsic approach to the instant case, the Blinders urge that they were not given a chance to participate in the process because the district court failed to apply the facts to the law to find that the Blinders and Hoxworth plaintiffs were parties to the settlement agreement, an issue raised at least three times during the appellate process. (App. 58a, 65-66a, 69-70a.)

Applying the instrumental approach, the Blinders urge that society's agreed upon rules of conduct, (embodied in the process of de novo review) as well as its rules for distributing various benefits were not accurately or consistently followed in this case as shown by facts intrinsic in the proceedings below.

B. Intrinsic Facts Showing Intentional Due Process Violation

1. Frequency of Raising Issue

To believe that the issue of the party status of the Hoxworth plaintiffs was *innocently* neglected by the court of appeals during the process of de novo review this Honorable Court must find that certain facts intrinsic in this case support such a conclusion. It would have to find, for example, that it is more likely than not that three senior appellate justices sitting in a federal court of appeals each negligently overlooked addressing the issue of whether party status of the Hoxworth plaintiffs and

the Blinders required application of res judicata even though that issue was clearly raised in the opening briefs of the parties and later raised again in a petition for rehearing. (App. 58a, 65-66a, 69-70a.)

2. Simplicity of Issue Not Reviewed

A fact which increases the likelihood that the court of appeals intentionally failed to review party status is the very simplicity of the syllogism supporting the legal doctrine at issue and the relative simplicity of applying the facts to the law.

Each Justice of this Honorable Court likely knows from his or her own legal education and experience that res judicata is part of every curricula in every recognized law school in the nation. Res judicata is the doctrine of the finality of civil judgments. Each attorney in this legal system is presumed to be competent to determine whether the premises of res judicata exist in a given cause prior to filing a complaint for relief against another person for the benefit of a client.

Although the personal experience of the Court is not part of the record, in this case it may be competent to resolve the issue of whether the due process violation was negligent or intentional particularly if it leads to a unanimous conclusion that the doctrine is so fundamental to the competent practice of law, that three different individuals seated as a panel of federal judges could not ignore its premises by accident.

3. Reliance on Facts Concerning Party's Identity

Another consideration material to this Honorable Court's determination of whether there was an intentional denial of review is whether certain facts appear in the opinion which suggest that the result may have been based upon the identity of the parties at the expense of the degree of process accorded.

In comparing the intrinsic and instrumental approaches to due process, Professor Tribe addressed additional factors tending to show that the failure to accord due process was a deprivation rather than a violation of due process.

> On either view – the intrinsic or the instrumental – the case for due process protections grows stronger as the identity of the person affected by a governmental choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual becomes more determinately within the decision maker's purview. For when government acts in a way that singles out identifiable individuals – in a way that is likely to be premised on suppositions about specific persons – it activates the special concern about being personally talked to about the decision rather than being simply dealt with. Moreover the danger of action motivated by personal animus or by some other substantively impermissible factor is heightened whenever a specific individual is targeted, highlighting the need for procedures to ensure that the government's acts fit within the framework of applicable law.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 667 (2d ed. 1988)

The court of appeals opinion contains statements which raise the issue of whether the identity of the persons affected by the its decision became an issue. If identity was a factor, the case for enforcing due process grows stronger. After describing the nature of the case, the first few lines of the court of appeals statement of facts are:

> Meyer Blinder was the "penny stock" king of Colorado. . . . Mr. Blinder's empire began to collapse when Dan and Louise Hoxworth filed a class action suit in the United States district Court for the District of Pennsylvania on behalf of a group of investors, claiming Mr. Blinder overcharged and defrauded the purchasers and sellers of certain securities in violation of federal and state securities laws, RICO and common law fiduciary duty.

(App 4a.)

This finding is supplemented by a footnote which states

> "Penny stocks" are low-priced, high risk equity securities. The securities are frequently traded outside well-established trading markets.

Id.

None of these facts have any bearing on whether the affirmative defense of res judicata applied to bar relitigation of a bankruptcy court settlement. All of these facts were the product of a default proceeding conducted in Pennsylvania during the same time Mr. Blinder was on

trial in Colorado and after all of his money had been seized by the Colorado bankruptcy court. The facts have nothing to do with party status, identity of claims or any final judgment on the merits, yet these facts and many others along the same lines are recognized by the court of appeals as it neglects to review the party status of the Hoxworths and Blinders.

The connotation attendant with describing a party as the former king of speculative securities that are frequently traded outside of well-established markets and the focus on "facts" arising out of two very unusual default proceedings creates a reasonable inference that the primary purpose of the panel in noting such facts was to explain the actual basis for its decision. The court of appeals opinion that Mr. Blinder's "empire" began to collapse when the Hoxworth plaintiffs filed their lawsuit is neither accurate nor supported by competent evidence in the record.

The statements imply to a reasonable person that the panel believed that Meyer Blinder's identity and the panel's personal beliefs about his past were material considerations in reaching the opinion rendered which justified *decreasing* the normal process accorded on *de novo* review culminating in a refusal to review a central issue on appeal in a situation which Professor Tribe concluded required *increased* protection of due process rights.

The process substituted by the court of appeals for due process was the process of forming a judgment about a cause on facts irrelevant to the issues, and disregarding the facts relevant to the issues on the strength of beliefs about the irrelevant facts. Where matters outside of the

relevant issues raised on appeal based upon the identity of appellant become the focus of the reasoning process, while matters relevant to appeal are ignored it appears that the decision is based more on prejudice than sound reasoning.

4. Depth of Analysis

The conclusion that the court of appeals intentionally disregarded material issues is further reinforced by the depth of analysis contained in the court of appeals' opinion. The court of appeals court paid close attention to the selective use of legal principles such as privity without acknowledging contradictory facts and legal authority raised by the Blinders.

The frequency with which the Blinders raised the issue not reviewed; the simplicity of the issue to be reviewed; the indication that the court of appeals placed great emphasis on personal facts about one of the Blinders while disregarding the issue raised on appeal; and the depth of the court of appeals' analysis are the factors which should control this Honorable Court's decision whether to grant review.

It is obvious from the citations to the appendix that review on party status of the Hoxworth plaintiffs was requested more than once and never granted. It is equally clear that res judicata is such a fundamental element of American Jurisprudence that it stretches credulity to find that three senior federal court justices simply forgot to conduct a complete review of its premises. Coupled with

the emphasis the court of appeals placed on facts concerning Mr. Blinder's past, irrelevant to the issue of res judicata barring relitigation of identical claims, and the intensity and complexity of the remainder of the court of appeals' opinion it appears that the decision not to review party status as raised was an intentional decision.

The language of Supreme Court Rule 10 makes it clear that this Honorable Court's determination of the issue of intent or neglect in the panel's failure to address all issues raised on appeal is discretionary. The court of appeals' failure to review an issue raised on appeal where the issue involved enforcement of federal law accompanied by a refusal to enforce the law by both lower courts placed the Blinders in a position of losing their Fifth Amendment right to due process of law and left them at the mercy of this Honorable Court to decide whether to exercise its prerogative to be the sole enforcer and guardian of that right.

III. THE UNITED STATES COURT OF APPEALS HAS SANCTIONED THE DEPARTURE OF THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWERS.

The district court departed from the accepted and usual course of judicial proceedings requiring it to acknowledge and apply an undisputed material fact in the record when it refused to find that Lillian Blinder was a creditor of the estate. It further departed from the accepted and usual course of judicial proceedings by

electing to entirely avoid the issue of whether the Hoxworth plaintiffs and the Blinders were all parties to the bankruptcy court-approved settlement agreement regardless of whether they were all creditors.

The arguments advanced below which the district court ignored were that party status rather than party type controlled the application of res judicata. The only substantive difference in the court of appeals opinion is that the district court erred in finding that Lillian Blinder was not a creditor. Both courts neglected to directly confront the Hoxworth plaintiffs' party status.

The district court's neglect was a denial of due process which should have been apparent to the court of appeals. The court of appeals ratification of the district court's denial of due process was a deprivation of due process where the intrinsic facts of the case support no reasonable inference that the ratification was a product of innocent negligence. The requirements for review under Rule 10 have been met.

CONCLUSION

The opinion of the court of appeals overrules the Supreme Court syllogism for res judicata where it has found facts sufficient to conclude the Hoxworth plaintiffs were parties, admitted that they were parties yet held that party status or privity are no longer alternative components of third element of res judicata. The court of appeals has combined two disjunctive components of a three-hundred-year-old legal syllogism in the conjunctive. The effect of this change is that a privy who becomes

a party may claim to be a party to exercise objections and avail himself of a right of appeal and become a privy if he loses the appeal, thereby avoiding claim preclusion. This is a matter of great importance because the opinion if not reviewed will have the practical effect of destabilizing the settlement process in bankruptcy courts and clogging the federal courts with litigation and appeals.

The Blinders relied upon the existing law of res judicata to their detriment. The material alteration of the law which would later occur at the court of appeals was neither disclosed to them nor anticipated by either. The court of appeals and the district court should be estopped from asserting a new theory which destroys most of the consid.ration for the settlement.

Beyond the implication of res judicata, the opinion confuses whether a de novo review requires a full review of the facts and issues and whether any appeal as a matter of right in this district requires the court of appeals to address all material issues presented for review.

Where the only two federal forums available as a matter of right fail to grant review on a material issue of fact and law, there is no review at all. This is particularly true where the legal issue is clearly framed and repeatedly raised, relatively simple to understand and apply, and material to deciding whether to enforce the judgment of a federal district court.

The lack of review is particularly offensive to due process in this case because the failure to enforce the prior order resulted in a subsequent extra-jurisdictional

order which defeated the entire purpose of the settlement process by which the prior order was procured.

The lower court decisions invade the final judgment on the merits and arbitrarily destroy the benefits which one of the parties was supposed to derive therefrom while increasing the benefits other parties lost. A conclusion that the failure to address a material issue raised on review was mere error of fact or law within the discretion of the courts is not supported here. In such cases the only supervisor of the lower courts' enforcement of the Fifth Amendment is this Honorable Court.

For the reasons stated above, the Blinders pray that this Honorable Court restabilize the settlement law in this circuit and exercise its discretion and supervisory powers by granting a review consisting of applying the fact that the Hoxworth plaintiffs are parties to the law of res judicata, order that the declaratory judgment be vacated forthwith, and enter any other relief as the Court may deem necessary.

Respectfully submitted,

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Attorney for Petitioners

Dated: May 28, 1996

Dan H. HOXWORTH, named: Dan Hoxworth; Louise A. Hoxworth, named: Louise Hoxworth, individually and on behalf of the Hoxworth Class, Plaintiffs/Counter-Defendants/Appellees,

v.

Lillian BLINDER; Lillian Blinder Trust, the, Defendants/Cross-Claimants/Appellants,

and

Meyer Blinder; Donald L. Walford; Walford Demaret & Company, Inc.; Bradford Bolton, Clerk, United States Bankruptcy Court for the District of Colorado, Defendants.

Dan H. HOXWORTH, named: Dan Hoxworth; Louise A. Hoxworth, named: Louise Hoxworth, individually and on behalf of the Hoxworth Class, Plaintiffs/Counter-Defendants/Appellees,

v.

Meyer BLINDER, Defendant-Appellant,

and

Donald L. Walford; Walford Demaret & Company, Inc.; Bradford Bolton, Clerk, United States Bankruptcy Court for the District of Colorado, Defendants,

Lillian Blinder; Lillian Blinder Trust, the, Defendants/Cross-Claimants.

Nos. 94-1474, 94-1508.

United States Court of Appeals,
Tenth Circuit.

Jan. 22, 1996.
Rehearing Denied Feb. 27, 1996.

Judgment creditors commenced action against judgment debtor, debtor's wife, trust, other creditors, and bankruptcy court clerk, seeking declaration as to their rights to assets being held in bankruptcy court's registry. Wife filed cross-claim against plaintiffs and claim against other creditors, seeking declaration of her rights in disputed assets. The United States District Court for the District of Colorado, Jim R. Carrigan, J., 170 B.R. 438, granted judgment creditors equitable lien over assets held in trust and traceable to funds defrauded from judgment creditors by debtor. Debtor and wife appealed. The Court of Appeals, John P. Moore, Circuit Judge, held that: (1) judgment creditors were not barred by res judicata from asserting equitable lien over assets excluded from bankruptcy estate of judgment debtor's corporation, and (2) judgment creditors' equitable lien over assets of judgment debtor and his wife was not waived or extinguished when creditors settled their unsecured claim with trustee of bankruptcy estate of judgment debtor's corporation without asserting their lien against estate.

Affirmed.

John M. Richilano (John A. Berman, with him on the briefs), Denver, Colorado, for Appellants Lillian Blinder and The Lillian Blinder Trust.

Ellen Meriwether (Jeffrey M. Villanueva and Randolph Dement, Bader & Villanueva, P.C., Denver, Colorado, with her on the briefs), Miller Faucher Chertow Cafferty and Wexler, Philadelphia, Pennsylvania, for Appellees Dan and Louise Hoxworth.

John Fogerty Winston, Englewood, Colorado, for Appellant Meyer Blinder.

Before MOORE, BRORBY, and KELLY, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

Defendants Meyer Blinder and Lillian Blinder appeal a decision of the district court, asking us to decide whether a judgment creditor may assert an equitable lien against assets excluded from a bankruptcy estate pursuant to a settlement agreement when the creditor was also an unsecured creditor of the estate and in privity with the trustee by virtue of the unsecured claim. We conclude the creditor is neither in privity with the trustee nor otherwise barred by the settlement agreement from asserting its secured lien. Consequently, we affirm the district court.

The Blinders appeal from a district court order granting plaintiffs, Dan and Louise Hoxworth, individually and on behalf of a class of investors (the Hoxworth Class), an equitable lien over assets now held in the Lillian Blinder Trust and traceable to funds defrauded from the Hoxworth Class by Meyer Blinder. *Hoxworth v. Blinder,* 170 B.R. 438, 444 (D.Colo.1994). There are two issues pertinent to our resolution of this matter: first, whether the Hoxworth Class was in privity with the bankruptcy trustee of the Blinder, Robinson & Co. estate and, therefore, barred by *res judicata* from asserting an equitable lien over assets excluded from the bankruptcy estate pursuant to a settlement agreement between the trustee and the Blinders; and, second, whether the Hoxworth Class' equitable lien was waived or extinguished when the class settled its unsecured claim with the trustee without asserting its lien against the estate.

I.

Meyer Blinder was the "penny stock" king of Colorado.[1] As president of Blinder, Robinson & Co., a Colorado-based securities firm, Mr. Blinder amassed a fortune of $24 million and, with his wife, Lillian Blinder, controlled a securities empire including 85 branch offices and 1800 brokers. Mr. Blinder's empire began to collapse when Dan and Louise Hoxworth filed a class action suit in the United States District Court for the District of Pennsylvania on behalf of a group of investors, claiming Mr. Blinder overcharged and defrauded the purchasers and sellers of certain securities in violation of federal and state securities laws, RICO, and common law fiduciary duty. A summary of the class action is found in *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912 (3d Cir.1992).

The Hoxworth Class obtained a default judgment in the Pennsylvania federal district court against Meyer Blinder for over $70 million. More importantly, the court imposed a constructive trust and an equitable lien on all assets in which Meyer Blinder held an interest, as well as a constructive trust and equitable lien on all assets, by whomever held, that can be traced to the funds defrauded from the Hoxworth Class. The district court judgment was affirmed in all respects by the Third Circuit. *Id.* at 927.

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[1] "Penny stocks" are low-priced, high risk equity securities. The securities are frequently traded outside well-established trading markets.

The present action arose when the Hoxworth Class attempted to assert its equitable lien over assets controlled by the Lillian Blinder Trust and traceable to the Blinder's fraudulent activities. The Hoxworth Class' tracing method is not in dispute. *Hoxworth*, 170 B.R. at 443. Instead, the Blinders challenge the Hoxworth Class' authority to exercise the lien in light of Blinder Robinson's liquidation and the settlement agreement that arose out of that bankruptcy proceeding.

Proceedings for liquidation of Blinder Robinson were commenced in the United States Bankruptcy Court for the District of Colorado while the Pennsylvania class action against Meyer Blinder was still pending. Based upon its transactions with Blinder Robinson, the Hoxworth Class filed an unsecured proof of claim against the Blinder Robinson estate. Assertedly, this claim was separate from the Pennsylvania claim against Meyer Blinder.

The bankruptcy trustee, representing all creditors of the estate, entered into a settlement agreement with the Blinders (the Blinder Settlement). The agreement required the Blinders to transfer all their assets into the Blinder Robinson estate with the exception of certain assets then valued at approximately $1.8 million (the Excluded Assets). The Excluded Assets were to be held in the Lillian Blinder trust and are the subject of this appeal. The Hoxworth Class, as creditors of the estate, appealed the bankruptcy court's approval of the Blinder Settlement because the terms were not in the best interest of the estate and its creditors.

To move ahead with the Blinder Settlement, the trustee negotiated a settlement agreement with the Hoxworth Class (the Hoxworth Settlement), which disposed of all claims between the class and the Blinder Robinson estate. The Hoxworth Class agreed to dismiss its appeal of the Blinder Settlement and to modify an injunction the Pennsylvania court had placed over Meyer Blinder's assets to allow the trustee to proceed with the Blinder Settlement. In return, the trustee allowed the Hoxworth Class to assert a $30 million unsecured proof of claim against the Blinder Robinson estate. The various adversarial proceedings and injunctions leading up to the trustee's settlement agreements with the Blinders and with the Hoxworth Class are detailed in the district court opinion. *Hoxworth,* 170 B.R. at 439-41.

This case was submitted to the district court for decision upon a stipulated evidentiary record. Consequently, we review the district court ruling *de novo. FDIC v. Kansas Bankers Sur. Co.,* 963 F.2d 289, 292 (10th Cir.1992).

II.

The Blinders' first argument relies on the doctrine of *res judicata.* They claim the trustee, in his negotiations with the Blinders, represented all creditors to the Blinder Robinson estate, including the Hoxworth Class. Relying on *In re Medomak Canning,* 922 F.2d 895 (1st Cir.1990), the Blinders argue the trustee and the Hoxworth Class were in privity because the two shared identical interests. They assert that while the Hoxworth Class could have enforced its equitable lien in the bankruptcy proceeding, it failed

to do so. Thus, the Blinder Settlement, negotiated by the trustee as a representative to the Hoxworth Class, is *res judicata* as to any claim the class may have over the Excluded Assets.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414-15, 66 L.Ed.2d 308 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876)). The doctrine is intended to relieve parties of burdensome multiple lawsuits, prevent inconsistent decisions, and encourage reliance on adjudication. *Id.* To prevail on a defense of *res judicata* requires a defendant to establish: (1) a final judgment on the merits in the prior action, (2) the claims raised in the subsequent action were identical to those decided in the prior action, and (3) the prior action involved the same parties or their privies. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir.1993).

Generally, court-approved settlements receive the same *res judicata* effect as litigated judgments. *Medomak*, 922 F.2d at 900; *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 476 (Fed.Cir.1991). Thus, the bankruptcy court-approved settlement between the trustee and the Blinders serves as a prior final judgment. Additionally, the Blinder Settlement and the present action involve an identical claim – rights to the $1.8 million in Excluded Assets. However, we cannot conclude the third element of *res judicata* is met because the Hoxworth Class was not in privity of interest with the trustee.

Although the Hoxworth Class was a creditor of the estate and in privity with the trustee regarding its unsecured proof of claim, the class was also a judgment creditor of Meyer Blinder. The district court properly concluded "the plaintiffs' asserted interest in the excluded assets is not based on their status as creditors of the Blinder Robinson estate, but rather on their status as judgment creditors of Meyer Blinder." *Hoxworth*, 170 B.R. at 442. As a judgment creditor, the class was an adversary to the trustee.

According to the Restatement (Second) of Judgments, "[a] person is not bound by a judgment for or against a party who purports to represent him if . . . [w]ith respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class . . . that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked. . . . " Restatement (Second) of Judgments § 42(1)(d) (1980). As a judgment creditor of Meyer Blinder, the Hoxworth Class was in direct opposition with the trustee. Every dollar of Meyer Blinder's assets the Hoxworth Class reached by imposition of its secured lien would leave one dollar less in the Blinder Robinson estate for the trustee to satisfy creditors. Until the Hoxworth Settlement was reached, the trustee and the Hoxworth Class were in a standoff – each party enjoined from enforcing their respective judgments over the Blinder assets. The parties polar objectives lead us to conclude the trustee represented the Hoxworth Class only as creditors to the Blinder Robinson estate. No privity of interest extended from the trustee to the Hoxworth Class as judgment creditors of Meyer Blinder.

The Blinder's reliance on *Medomak* is misplaced. In *Medomak*, the bankruptcy trustee entered into a settlement agreement with senior mortgagees, giving certain mortgages secured status in return for cash payments and the subordination of the mortgagees' remaining claims to all other allowed unsecured claims. Two unsecured junior lien-holders attempted to circumvent the settlement and sought equitable subordination of the mortgagees' secured claims. The First Circuit concluded the junior creditors were in privity with the trustee, who had acted on behalf of all the creditors of the estate, and were bound by the bankruptcy court's approval of the settlement. Unlike the trustee to the Blinder Robinson estate, however, who could not properly represent the Hoxworth Class regarding its secured judgment against Meyer Blinder, the trustee in *Medomak* was the proper party to represent the unsecured creditors interests. *Medomak*, 922 F.2d at 902. Also, in *Medomak*, the equitable lien was against the bankruptcy debtor's estate. Here, the equitable lien is directed toward Mr. Blinder, individually. His assets were traced into the bankruptcy court registry. Finally, in *Medomak*, the trustee specifically surrendered all equitable subordination claims against the mortgagees in the court-approved compromise. In contrast, the Blinder Settlement is silent regarding the Hoxworth Class equitable lien and does not surrender those claims as part of the agreement. In short, *Medomak* provides no succor for the Blinder's *res judicata* claim.

III.

The Blinders also argue the Hoxworth Class waived the right to assert its equitable lien over the Excluded

Assets when the class dismissed its appeal of the Blinder Settlement and settled all claims with the trustee without ever asserting its lien against the property of the estate. The Blinders claim a bankruptcy court order which transferred Blinder assets into the bankruptcy court registry limited the Hoxworth class to asserting its lien against the estate exclusively.

Prior to the Blinder settlement, the trustee initiated an adversary action in the bankruptcy court against the Blinders seeking a declaration that the Blinders operated Blinder Robinson as their alter ego and that all their assets were the property of the Blinder Robinson estate. The bankruptcy court granted a default judgment to that effect and ordered the Blinders to transfer to the trustee all their individual and joint property. The Blinders now contend the bankruptcy court's alter ego ruling universally and automatically transformed ownership of Meyer Blinder's assets into those of the bankruptcy estate. They argue, after this transfer, the Hoxworth Class was obligated to make its election in the bankruptcy court or forever forfeit the right to assert its equitable lien. The Blinders rely on this Court's holding in *DeLaney v. City & County of Denver*, 185 F.2d 246 (10th Cir.1950), to claim the Hoxworth class chose to prove its claim as unsecured and, therefore, must "surrender [its] security." *Id.* at 251.

Section 506(a) of the Bankruptcy Code states that allowed claims may be secured to the extent of the creditor's interest in the estate's interest in the property, and unsecured to the extent that the value of the creditor's interest is less than the amount of the allowed claim. 11 U.S.C. § 506(a) (1988). Thus, a creditor can have both a secured and unsecured claim arising out of the same

transaction. Further, section 501(a) of the code provides equity security holders with the option to file a proof of interest. The provision indicates the subsection is permissive only, and does not require filing a proof of claim or a proof of interest by any creditor. 11 U.S.C. § 501(a) (1988). Therefore, the code allows the Hoxworth Class to make an unsecured proof of claim against the estate, and not assert its secured lien against assets traced into the estate.

The Blinders contend the bankruptcy court's alter ego judgment extinguished the Hoxworth Class' equitable lien. However, the district court properly concluded the alter ego judgment merely transferred legal title of the Blinder assets to the trustee. *Hoxworth*, 170 B.R. at 442-43. Under 11 U.S.C. § 541(d):

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Even if the Excluded Assets were transferred to the trustee, equitable title to those assets never became part of the estate. *See In re Mahan & Rowsey, Inc.*, 817 F.2d 682, 684. (10th Cir.1987). The equitable lien would have attached to the transferred assets just as a consensual lien to property survives a transfer of ownership.

More importantly, however, we conclude the assets sought by the Hoxworth Class were never included in the bankruptcy estate. Although the Excluded Assets were deposited with the bankruptcy registry as security for a

stay of execution, the terms of the Blinder Settlement specifically excluded those assets from the bankruptcy estate. The court-approved settlement provided that the Lillian Blinder Trust "shall retain all assets specifically identified [as the Excluded Assets] . . . and the L.B. Trust shall transfer to the Trustee all of its right, title, and interest in all other assets in which the L.B. Trust has or claims any interest." (Joint App. at 184-85). The trustee essentially abandoned the Excluded Assets to the Lillian Blinder trust. Consequently, the bankruptcy court declined to assert jurisdiction over the assets and to decide the relative rights, claims, and interests of competing claimants to property which, in its view, appeared not to be part of the debtor's estate.

Unless the collateral is in the possession of the bankruptcy court or the trustee, the secured creditor does not have to file a claim. *Matter of Tarnow*, 749 F.2d 464, 465 (7th Cir.1984). The Blinders' use of *DeLaney*, therefore, is inappropriate. Unlike *DeLaney*, the Hoxworth Class is asserting its lien against a non-debtor over assets outside the bankruptcy estate. The settlement between the Hoxworth Class and the trustee only prevented the class from asserting its lien against the estate. It did not require the class to surrender its lien against assets outside the estate as long as those assets were traced to funds defrauded from the class.

AFFIRMED.

Dan and Louise HOXWORTH, et al., Plaintiffs,

v.

Lillian BLINDER, et al., Defendants.

No. 93-C-1260.

United States District Court, D. Colorado.

July 29, 1994.

Judgment creditors commenced action against judgment debtor, debtor's wife, trust, other creditors, and bankruptcy court clerk, seeking declaration as to their rights to assets being held in bankruptcy court's registry. Wife filed cross-claim against plaintiffs and claim against other creditors, seeking declaration of her rights in disputed assets. The District Court, Carrigan, J., held that: (1) judgment creditors' claim was not barred by res judicata even though they had dropped their appeal of settlement agreement between bankruptcy trustee, judgment debtor, and his wife; (2) judgment creditors' equitable liens were not extinguished when bankruptcy court declared that property of judgment debtor and his wife belonged to bankruptcy estate of corporation in which judgment debtor was president; (3) judgment creditors' settlement with bankruptcy trustee did not cause their equitable liens to evaporate, but only precluded them from asserting their liens against bankruptcy estate; and (4) judgment creditors had equitable interest in any assets held by judgment debtor, or one-half interest in assets held by judgment debtor and his wife as joint tenants,

after commencement of class period in underlying securities litigation, even if those assets were acquired prior to that date.

So ordered.

John Richilano, Denver, CO, for plaintiffs.

Steve A. Miller, Denver, CO, for defendants.

MEMORANDUM OPINION AND ORDER

CARRIGAN, District Judge.

Plaintiffs Dan and Louise Hoxworth, individually and on behalf of the Hoxworth class, commenced this action against the defendants Meyer and Lillian Blinder (collectively the Blinders), the Lillian Blinder Trust, Donald Walford and Walford, Demaret & Co. (collectively the Walfords), and Bradford L. Bolton, the Clerk of the United States Bankruptcy Court for the District of Colorado, seeking a declaration as to their rights to certain assets now being held in the registry of the United States Bankruptcy Court for the District of Colorado. Lillian Blinder filed a cross-claim against the plaintiffs, as well as a claim against the Walfords, seeking a declaration of her rights in the disputed assets.

The issues have been briefed extensively and oral argument was heard on July 15, 1994. Jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1332, 1963, 1346, 2041, and 2042.

I. *FACTUAL BACKGROUND.*

In January 1988, the plaintiffs commenced three actions in the United States District Court for the Eastern District of Pennsylvania, all of which alleged fraud in marketing certain securities. Named as defendants in those suits were Blinder, Robinson & Co., Inc. (Blinder Robinson) and Meyer Blinder, its president and control person. In early 1989, Intercontinental Enterprises, Inc. (IEI), Blinder Robinson's parent corporation, was added as a defendant.

On August 1, 1990, proceedings for liquidation of Blinder Robinson were commenced in the United States Bankruptcy Court for the District of Colorado. As a result, all proceedings in the Eastern District of Pennsylvania were stayed with respect to Blinder Robinson. Plaintiffs' actions in Pennsylvania continued against Meyer Blinder and IEI. In addition the plaintiffs filed in the bankruptcy court for Colorado a proof of claim against Blinder Robinson in the amount of $50 million.

In March 1991, the trustee for liquidation of Blinder Robinson commenced an action in the bankruptcy court against the Blinders, seeking a declaration that Blinder Robinson and the Blinders were alter egos, and that all of the Blinders' individual and joint assets were properly the property of the Blinder Robinson bankruptcy estate.[1]

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[1] At about the same time, the trustee commenced an adversary action against the plaintiffs, seeking to enjoin the plaintiffs from proceeding with their claims against Meyer Blinder and IEI. This action was premised on the theory that the automatic stay provisions of 11 U.S.C. § 362(a) should extend to Meyer Blinder and IEI as alter egos of Blinder Robinson. The

On January 10, 1992, in response to continued discovery abuses, the bankruptcy court entered default judgment against the Blinders, declaring that Blinder Robinson was their alter ego and ordering the Blinders to transfer to the trustee "all of their individual and joint property whether directly or indirectly owned and wherever located and by whoever held, including any property held in trust for the benefit of either Meyer or Lillian Blinder." (Record at 120). On February 4, 1992, the assets were transferred into the bankruptcy court registry to be held in *custodia legis* in lieu of a supersedeas bond.

On February 7, 1992, the plaintiffs obtained a judgment in the United States District Court for the Eastern District of Pennsylvania against Meyer Blinder and John Cox in the amount of $73,319,824.45, and against IEI in the amount of $70,111,812.55.[2] The district court in Pennsylvania imposed a constructive trust and an equitable lien on all assets in which Meyer Blinder had an interest, as well as a constructive trust and an equitable lien on all assets traceable to the $23 million that was defrauded from the plaintiffs, irrespective of who held those assets. The judgment was affirmed by the Third Circuit, and has been registered in this District at Docket No. 92-RJ-87.

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bankruptcy court denied the trustee's request to enjoin the plaintiffs.

[2] The total judgments were derived by tripling the actual damage award as provided by 18 U.S.C. § 1964 and adding costs and attorneys' fees. The judgment against IEI was less than that against Meyer Blinder and John Cox because IEI came into existence eight months after the start of the class period.

On March 12, 1992, before the plaintiffs had an opportunity to execute their judgment, the bankruptcy court issued a final order declaring that all the Blinders' property, and all the assets in the Lillian Blinder Trust, were the property of the Blinder Robinson estate, and all were being held in *custodia legis* by the bankruptcy court.[3] (Record at 122-27). On March 17, 1992, however, the United States District Court for the Eastern District of Pennsylvania enjoined Meyer Blinder and IEI from "selling, transferring or otherwise disposing of any of their assets, other than in the ordinary course of business, notwithstanding the March 12, 1992 Order of the United States Bankruptcy Court for the District of Colorado."[4] (Record at 119).

On August 12, 1992, the trustee reached a settlement agreement with the Blinders in the alter ego action that was then on appeal (the Blinder settlement). Pursuant to the agreement, the Blinders were to transfer all of their assets to the Blinder Robinson estate, with the exception of assets then valued at approximately $1.8 million which were to be held by the Lillian Blinder Trust. These assets are known as the "excluded assets." The settlement agreement was approved by the bankruptcy court over

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[3] The Blinders' liability as alter egos of Blinder Robinson was established by the bankruptcy court in its order dated January 10, 1992. The March 12, 1992 order came after a six day trial in which damages were determined with respect to the Blinders, and liability and damages were determined with respect to IEI.

[4] The March 12, 1992 order was a clarification of a previous order, issued on February 28, 1992, enjoining the transfer of assets except in the ordinary course of business.

the plaintiffs' objections and the plaintiffs appealed. The Blinder settlement, however, could not be consummated because of the Pennsylvania district court's injunction.

On September 21, 1992, the plaintiffs and the trustee settled all outstanding claims against the estate, and the plaintiffs agreed to dismiss their appeal of the Blinder settlement. Plaintiffs were permitted to assert in the bankruptcy action a $30 million proof of claim. In exchange, the plaintiffs agreed to modify the Pennsylvania district court's injunction so the trustee could effectuate his settlement with the Blinders. Plaintiffs' settlement was approved by the bankruptcy court on October 26, 1992.

In March 1988, the Walfords obtained a multi-million dollar judgment against Blinder Robinson for malicious prosecution. Thus, they too are creditors of the Blinder Robinson estate. On November 5, 1990, the Walfords settled with the bankruptcy trustee, but they did not release their claims against Meyer Blinder, IEI, or the officers and directors of Blinder Robinson and IEI. On October 26, 1992, the Walfords filed an action in the Arapahoe County, Colorado, District Court, claiming an interest in the excluded assets on the ground that Meyer and Lillian Blinder and the Lillian Blinder Trust are the alter egos of Blinder Robinson. The Walfords' motion for summary judgment currently is pending before the Arapahoe County District Court.

II. *ANALYSIS.*

The plaintiffs assert that they are entitled to the $1.8 million excluded assets as judgment creditors of Meyer Blinder. They argue that the excluded assets are traceable to the defrauded funds and therefore are subject to their equitable lien.

The Blinders respond that the plaintiffs' claim is barred by res judicata.[5] They further contend that the plaintiffs' equitable lien in the excluded assets was cut off on March 12, 1992, when the bankruptcy court declared that the Blinders and Blinder Robinson were alter egos and all of Meyer Blinder's assets belonged to the Blinder Robinson estate. Lastly, the Blinders respond that the plaintiffs waived all interest in the excluded assets when they dropped their appeal of the Blinder settlement and agreed to modify the district court injunction.

A. *Res Judicata.*

The Blinders argue that the plaintiffs' claim should be dismissed because it is barred by the doctrine of res judicata. Specifically, the Blinders contend that when the plaintiffs dropped their appeal of the Blinder settlement agreement, pursuant to their settlement with the trustee, they forever released any claims that they may have had

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[5] Meyer and Lillian Blinder are represented by separate counsel, each of whom filed a brief. Their arguments are similar, however, and they will be addressed together.

against the Blinder Robinson estate or the trustee's distributions of estate property to the Blinders. Plaintiffs concede that they released their claims against the estate, but argue that they never settled their claims against Meyer Blinder stemming from their judgment against him.

"Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the prior action." *Northern Natural Gas Co. v. Grounds*, 931 F.2d 678, 681 (10th Cir.1991). Within the bankruptcy context, an equitable lien against a bankruptcy estate is barred by res judicata if the lien holders fail to assert their liens upon notice of settlement between the trustee and various creditors of the bankruptcy estate. *In re Medomak Canning*, 922 F.2d 895 (1st Cir.1990).

The Blinders' reliance on *Medomak* presupposes that the plaintiffs are creditors of the Blinder Robinson estate who are asserting an interest in assets that were distributed to Lillian Blinder as a creditor of the estate. Lillian Blinder admits, however, that the excluded assets were given to her, not as a creditor, but "in consideration of the Blinders' abandonment of the appeal, which allowed the Trustee to keep the bulk of the Blinder assets, valued at some $12-17 million." (Lillian Blinder's Trial Brief at 7). Furthermore, the plaintiffs' asserted interest in the excluded assets is not based on their status as creditors of the Blinder Robinson estate, but rather on their status as judgment creditors of Meyer Blinder. Lastly, in *Medomak*, the equitable lien was against the bankruptcy debtor (in this case, Blinder Robinson), rather than against a party whose assets could be traced into the bankruptcy estate

(in this case, Meyer Blinder). Accordingly, I find and conclude that *Medomak* is distinguishable and that the plaintiffs' claim is not barred by res judicata.

B. *Equitable Lien.*

Plaintiffs argue that they have an equitable lien in the excluded assets because they are traceable to Meyer Blinder's assets or to the funds defrauded from the plaintiffs. The Blinders respond that any equitable liens that the plaintiffs might have had were extinguished when the bankruptcy court declared that the Blinders' property belonged to the Blinder Robinson estate. Alternatively, the Blinders argue that the plaintiffs' equitable liens were surrendered when they settled with the trustee, or that the plaintiffs failed to preserve them when they dropped their appeal of the Blinder settlement.

Once imposed, an equitable lien relates back to the date the wrongful act occurred. *In re Seneca Oil Co.*, 906 F.2d 1445, 1453 (10th Cir.1990).[6] Funds subject to an equitable lien do not become part of the bankruptcy estate. *In*

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[6] *In re Seneca Oil Co.* involved a constructive trust rather than an equitable lien. The primary distinction between an equitable lien and a constructive trust is that "the beneficiary of a constructive trust receives title to the trust property, [whereas] a plaintiff who receives an equitable lien obtains merely a security interest in the property held by the defendant." *In Re Marriage of Allen*, 724 P.2d 651, 658 (Colo.1986). The two operate similarly, however, in terms of "affording a preference over other creditors and in utilizing the rules for following property into its product." *Leyden v. Citicorp Indus. Bank*, 782 P.2d 6, 10 n. 8 (Colo.1989) (quoting Dan B. Dobbs, *Remedies* § 4.3, at 249 (1973)).

re Mahan & Rowsey, Inc., 817 F.2d 682, 684 (10th Cir.1987). Thus, the holder of an equitable lien does not have to trace the funds after the date of bankruptcy. *Seneca Oil*, 906 F.2d at 1453.

Plaintiffs' judgment against Meyer Blinder includes "an equitable lien on all funds, assets or property in which Meyer Blinder . . . has an interest," as well as "an equitable lien on all funds, assets or property, by whomever held, any portion of which can be traced to the $23,570,447.46 defrauded from the Plaintiff Class." These equitable liens relate back to the date of the original fraud – that is, September 1, 1984, the commencement of the class period. Thus, when the Blinders transferred their assets into the registry of the bankruptcy court, on February 4, 1992, they did so with the plaintiffs' equitable liens attached.

The Blinders first argue that the plaintiffs' equitable liens were extinguished when the bankruptcy court declared that the Blinders' property belonged to the Blinder Robinson estate. However, 11 U.S.C. § 541(d) provides:

> Property in which the debtor holds, as of commencement of the case, only legal title and not an equitable interest, . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Thus, even if the Blinders transferred legal title in their assets to the bankruptcy estate, the plaintiffs' equitable interest in the assets was not extinguished by the bankruptcy court's order. *See also Mahan & Rowsey*, 817 F.2d at

684 (holding that property subject to a constructive trust never becomes part of a bankruptcy estate).

Second, the Blinders contend that the plaintiffs waived their equitable liens by failing to preserve them when they settled with the trustee and received a $30 million proof of claim. They rely on *De Laney v. City and County of Denver*, 185 F.2d 246 (10th Cir.1950), where the court held:

> A lien claimant may pursue one of three courses: (1) he may prove his claim as an unsecured claim and surrender his security; (2) he may prove his claim as a secured claim, give credit thereon for the value of the security, and share in the general assets as to the unsecured balances; or (3) he may not file a claim at all and rely solely upon his lien.

Id. at 251. Where a lien holder chooses option one or two, he must file and prove his claim in the bankruptcy court. *Id.* If he elects to rely solely upon his lien, his lien is preserved even without the filing of a formal claim in the bankruptcy court. *Id.*

The Blinders argue that the plaintiffs chose the first option by asserting a $30 million proof of claim against the estate and surrendering their security – namely, their equitable liens. This argument might be persuasive if the plaintiffs were asserting their liens against funds in the bankruptcy estate. Plaintiffs concede, however, that they have settled their claims against the estate. Accordingly, they are not pursuing assets of the estate; rather, they seek to enforce their equitable liens against assets *outside* the bankruptcy estate. Plaintiffs' settlement with the trustee did not cause their equitable liens to evaporate, it

only precluded them from asserting their liens against the estate.

Finally, the Blinders reassert their argument that lien holders who fail to preserve their liens upon notice of settlement between the trustee and creditors of the bankruptcy estate are barred from later asserting the liens. This argument, however, is based on *Medomak*, 922 F.2d 895, a case that this court already has found distinguishable.

Accordingly, I find and conclude that the plaintiffs' equitable liens attached to the Blinders' assets on September 1, 1984 and were still attached when the trustee settled with the Blinders and allowed them to keep the excluded assets, then valued at approximately $1.8 million.

Plaintiffs contend that their equitable liens attach to all of the excluded assets because all can be traced to the defrauded funds. Specifically, they argue that Lillian Blinder never worked outside the home, and in light of the alter ego adjudication, all the excluded assets derived from Meyer Blinder's fraudulent activities and therefore are subject to the equitable lien. The Blinders respond that assets acquired before the class period commenced on September 1, 1984, cannot be traced to the defrauded funds. They further state that the plaintiffs' equitable lien in assets "in which Meyer Blinder has an interest" cannot attach to Lillian Blinder's interest in those assets.

I find and conclude that the plaintiffs' tracing theory is correct with respect to assets acquired after commencement of the class period. *See* Restatement of Restitution § 211(1) ("Where a person wrongfully mingles money of

another with money of his own and subsequently makes withdrawals from the mingled fund, the other is entitled to an equitable lien upon the part which remains and the part which is withdrawn or upon their product."). I agree with the Blinders, however, that assets acquired prior to commencement of the class period cannot be traced to the funds acquired by fraud. Accordingly, the plaintiffs' equitable lien in assets traceable to the defrauded funds cannot attach to assets acquired prior to September 1, 1984.

Plaintiffs have an equitable lien in assets "in which Meyer Blinder has an interest." This lien also relates back to September 1, 1984. Thus, the plaintiffs have an equitable lien in any assets held by Meyer Blinder, or a one-half interest in assets held by Meyer and Lillian Blinder as joint tenants, after September 1, 1984, even if those assets were acquired prior to that date.[7]

C. *The Walford Defendants.*

The Walfords assert an interest in the excluded assets based on their status as judgment creditors of Blinder Robinson and general creditors of the Blinder Robinson estate. They argue that the Blinders are collaterally estopped from relitigating the bankruptcy court's holding that they are alter egos of Blinder Robinson. Because

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[7] Apparently, Meyer Blinder transferred his interest in various assets to Lillian Blinder or the Lillian Blinder Trust sometime in 1990. These transfers did not extinguish the plaintiffs' equitable lien in those assets because neither Lillian nor the Trust were bona fide purchasers for value. *See* Restatement Restitution § 172; *In re Marriage of Allen*, 724 P.2d 651, 658 (Colo.1986).

Lillian Blinder is an alter ego of Blinder Robinson, the Walfords argue that they should be allowed to enforce their judgment against Blinder Robinson by executing on the excluded assets that she now holds.

The Walfords' obtained their judgment against Blinder Robinson in March 1988, that is subsequent to the date that the plaintiffs' equitable liens attached. The Walfords have not provided any authority to support their position that their judgment against Blinder Robinson somehow extinguished the plaintiffs' equitable liens.[8] Accordingly, the Walfords cannot satisfy their judgment by executing on the assets in which the plaintiffs have a prior equitable lien.

With respect to any assets not subject to the plaintiffs' equitable lien, the Walfords have commenced an action in the District Court for Arapahoe County, Colorado, against the Blinders and the Lillian Blinder Trust. There they argue that they are entitled to satisfy their judgment from the Blinders' assets because the Blinders are alter egos of Blinder Robinson. This state court action involves the same parties, and the same issues, as presented here. A hearing already has been held in that case, and the Walfords' motion for summary judgment currently is pending before the court. Accordingly, this court will abstain from deciding that dispute. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495, 62 S.Ct. 1173, 1175-76, 86 L.Ed. 1620 (1942); *Kunkel v. Continental Cas. Co.*, 866 F.2d 1269, 1276 (10th Cir.1989).

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[8] Indeed, it is not even clear that the Walfords take this position.

Accordingly, IT IS ORDERED that

(1) Plaintiffs have an equitable lien in those excluded assets that originally were acquired by the Blinders or the Lillian Blinder Trust subsequent to September 1, 1984, because they are traceable to funds, assets, or property defrauded from the plaintiffs;

(2) Plaintiffs have an equitable lien in those excluded assets in which Meyer Blinder had an interest subsequent to September 1, 1984, even if originally acquired prior to that date;

(3) The excluded assets in which the plaintiffs have an equitable lien will be held as security for return of the $23 million defrauded from the plaintiffs;

(4) Plaintiffs' rights to the excluded assets in which they have an equitable lien are superior to the defendants' rights in those assets.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Case No. 90-1170
BLINDER, ROBINSON & CO.,	)	SBB (SIPA)
Debtor(s),	)	
GLEN E. KELLER, JR., Trustee,	)	
Plaintiff(s),	)	Adversary No. 91-1283 RJB
v.	)	
MEYER BLINDER, LILLIAN BLINDER, and INTERCONTINENTAL ENTERPRISES, INC.,	)	(Filed Mar. 12, 1992)
Defendant(s).	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for trial commencing January 28, 1992, on the Plaintiff's Complaint. The original Complaint was filed herein on April 9, 1991. On May 10, 1991, the First Amended Complaint was filed and eventually all of the Defendants filed Answers. At the Pretrial Conference held on November 22, 1991, the Court granted motions to amend the pleadings. On November 26, 1991, the Second Amended Complaint was filed and the Defendants filed their Answers thereto on December 3, 1991. On December 12, 1991, the Court ordered that the Counterclaims of the Defendants be severed for all purposes including discovery and trial. On December 30, 1991, the Plaintiff's Motion for Partial Summary Judgment against Defendant Meyer Blinder on Claim VII was granted and final judgment in the sum of $10,693,214.00 was entered

against him. Also on December 30, 1991, the Plaintiff's Motion for Sanctions against all Defendants was granted. The Court ordered that default judgment enter against Defendants Meyer Blinder and Lillian Blinder on all claims and that Defendant Intercontinental Enterprises, Inc. ("IEI") would not be allowed to present evidence through witnesses or exhibits. On January 7, 1992, the court ordered that final judgment enter against Defendant Meyer Blinder on Plaintiff's Claim I, and judgment entered January 10, 1992.

Trial commenced on January 28, 1992, and continued through February 4, 1992. At trial Defendants Meyer Blinder and Lillian Blinder were represented by counsel. IEI was not represented by counsel.

This Court heard six days of testimony, took extensive notes, and has reviewed many, many documents. Although the Court could "re-write" all that evidence in making its findings and conclusions herein, there is no necessity in this case. This is because the Trustee's [Plaintiff's] Post-Trial Brief filed February 13, 1992, sufficiently and accurately sets forth this Court's findings and conclusions. Therefore, to avoid redundancy, this Court adopts the Trustee's Post-Trial Brief filed February 13, 1992, including the Endnotes attached thereto, as its Findings and Conclusions. It is, therefore,

ORDERED, ADJUDGED AND DECREED that judgment shall enter in favor of the Plaintiff and against the following Defendants on the Claims contained in the Second Amended Complaint, as follows:

1. Claim I – against Meyer Blinder and Lillian Blinder:

All of the individual and joint property of Meyer Blinder and Lillian Blinder (the "Blinder Property"), whether directly or indirectly owned and wherever located and by whomever held, is property of the Blinder, Robinson & Co., Inc. estate. The Blinder Property is held in *custodia legis* by this Court and is subject to the continuing jurisdiction of this Court. All of the assets held in the Lillian Blinder Trust (the "Trust Assets"), wherever located, are the property of the Blinder, Robinson & Co., Inc. estate. The Trust Assets are held in *custodia legis* by this Court and are subject to the continuing jurisdiction of this Court.

2. Claim II – against Intercontinental Enterprises, Inc.:

All of the property of Intercontinental Enterprises, Inc. and its subsidiaries (the "IEI Property"), whether directly or indirectly owned and wherever located and by whomever held, is property of the Blinder, Robinson & Co., Inc. estate. The IEI Property is held in *custodia legis* by this Court and is subject to the continuing jurisdiction of this Court. Intercontinental Enterprises, Inc., and all of its agents, servants and employees, shall within seven (7) days of the date of this order: (a) deliver or otherwise transfer to the Plaintiff all of the IEI Property, and (b) file all bankruptcy schedules required in a chapter 7 proceeding as required by 11 U.S.C. § 521 and the local rules of this Court.

3. Claim III – against Meyer Blinder and Intercontinental Enterprises, Inc., jointly and severally, in the sum of $111,859,186.00.

4. Claim IV – against Meyer Blinder in the sum of $22,254,477.00.

5. Claim VIII – against Meyer Blinder and Lillian Blinder, jointly and severally, in the sum of $4,509,426.00.

6. Claim IX – against Meyer Blinder and Lillian Blinder, jointly and severally, in the sum of $1,963,586.00.

7. Claim X – against Meyer Blinder and Lillian Blinder, jointly and severally, in the sum of $1,963,586.00.

8. Claim XI – against Meyer Blinder and Lillian Blinder, jointly and severally, in the sum of $6,130,134.00.

9. Claim XII – against Intercontinental Enterprises, Inc. in the sum of $13,593,280.00.

10. Claim XIII – against Intercontinental Enterprises, Inc. in the sum of $5,416,582.00.

11. Claim XIV – against Intercontinental Enterprises, Inc. in the sum of $5,416,582.00.

12. Claim XV – against Intercontinental Enterprises, Inc. in the sum of $13,593,280.00.

13. Claim XVI – against Intercontinental Enterprises, Inc. in the sum of $2,590,590.00.

14. Claim XVII – against Meyer Blinder in the sum of $111,859,186.00.

15. Claim XVIII – against Meyer Blinder in the sum of $72,151,192.00 and against Intercontinental Enterprises, Inc. in the sum $32,416,124.00.

16. Claim XX – against Intercontinental Enterprises, Inc. in the sum of $617,225.00. It is

FURTHER ORDERED that the above judgments overlap and in some cases are duplicative. Therefore, Meyer Blinder and Lillian Blinder may satisfy the monetary judgments against them by the payment of the total sum of $124,416,124.00 and that Intercontinental Enterprises, Inc. may satisfy the monetary judgments against it by the payment of $32,416,124. In addition, all Defendants may satisfy all monetary judgments against them by the joint payment of the total sum of $125,233,469.00. It is

FURTHER ORDERED that in accordance with Fed. R. Civ. P. Rule 54(b) and Bankruptcy Rule 7054 This Court determines there is no just reason for delay and the Clerk shall enter final judgment in accordance with this Order. The Court will issue a separate order in accordance with Fed. R. Civ. P. Rule 16 regarding the remaining Counterclaim herein.

Dated this 12th day of March, 1992.

BY THE COURT:

/s/ Roland J. Brumbaugh
Roland J. Brumbaugh
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Case No.
BLINDER, ROBINSON & CO., INC.	)	90-1170 SBB (SIPA)
Debtor(s),	)	
GLEN E. KELLER, JR., TRUSTEE For the Liquidation of the Business of Blinder, Robinson & Co., Inc.,	)	Adversary No. 91-1283 RJB
Plaintiff(s),	)	
v.	)	(Filed Jan. 10, 1992)
MEYER BLINDER, LILLIAN BLINDER, and INTERCONTINENTAL ENTERPRISES, INC., a Colorado corporation,	)	
Defendant(s).	)	

JUDGMENT

Pursuant to and in accordance with the Order signed by the Honorable Roland J. Brumbaugh, United States Bankruptcy Judge on January 10, 1992, it is

ORDERED that the Court finds that there is no just reason for delay in the entry of final judgment in favor of the Trustee on the Trustee's First Claim for Relief. Final Judgment is entered pursuant to Bankr. R. 7054 and Fed. R. Civ. P. 54(b) and hereby declares that Blinder Robinson was the alter ego and mere instrumentality of Defendants Meyer and Lillian Blinder. The Court further orders that

Meyer and Lillian Blinder shall within 7 days of the date of this order deliver or otherwise transfer to the Trustee all of their individual and joint property, whether directly or indirectly owned and wherever located and by whomever held, including any property held in any trust for the benefit of either Meyer or Lillian Blinder; and file all bankruptcy schedules required in a Chapter 7 proceeding by 11 U.S.C. § 521 and the local rules of this Court.

Dated this 10th day of January, 1992.

Bradford L. Bolton, Clerk

By: /s/ Jeanie Hurtado
Jeanie Hurtado,
Deputy Clerk
United States Bankruptcy
Clerk
721 19th Street
Denver, Colorado 80202-2508

APPROVED AS TO FORM:

/s/ Roland J. Brumbaugh
Roland J. Brumbaugh, Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAN H. HOXWORTH, named; Dan Hoxworth, LOUISE A. HOXWORTH, named; Louise Hoxworth, individually and on behalf of the Hoxworth class,	)	Nos. 94-1474 94-1508
Plaintiffs-Counter-Defendants-Appellees,	)	
v.	)	
MEYER BLINDER,	)	
Defendant-Appellant,	)	
and	)	
DONALD L. WALFORD; WALFORD DEMARET & COMPANY, INC.; BRADFORD BOLTON, Clerk, United States Bankruptcy Court for the District of Colorado,	)	
Defendants,	)	
LILLIAN BLINDER; LILLIAN BLINDER TRUST, THE,	)	
Defendants-Cross-Claimants/Appellants.	)	

ORDER
Entered February 28, 1996

Before PORFILIO, BRORBY, and KELLY, Circuit Judges.

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing in banc.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestions for rehearing in banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing in banc are denied.

Entered for the Court
PATRICK FISHER, Clerk
By /s/ Audrey F. Weigel
Deputy Clerk

CONSTITUTIONAL PROVISION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * *

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

* * *

§ 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

* * *

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of

which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

* * *

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding or tort, except that

the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

* * *

§ 1963. Registration of judgments of the district courts and the Court of International Trade

A judgment in an action for the recovery of money or property entered in any district court or in the Court of International Trade may be registered by filing a certified copy of such judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

* * *

§ 2041. Deposit of moneys in pending or adjudicated cases

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

§ 2042. Withdrawal

No money deposited under section 2041 of this title shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

RESTATEMENT (SECOND) OF JUDGMENTS

TOPIC 1. PARTIES AND PERSONS REPRESENTED BY PARTIES

§ 34. Parties to an Action

(1) A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action.

(2) A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party, except as stated in §§ 35 to 38.

(3) A person who is not a party to an action is not bound by or entitled to the benefits of the rules of res judicata, except as stated in §§ 30-32 and in this Chapter.

* * *

§ 41. Person Represented by a Party

(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

Exceptions to this general rule are stated in § 42.

§ 42. Exceptions to the General Rule of Representation

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(a) Notice concerning the representation was required to be given to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement; or

(b) The subject matter of the action was not within the interests of the represented person that the party is responsible for protecting; or

(c) Before rendition of the judgment the party was divested of representative authority with respect to the matters as to which the judgment is subsequently invoked; or

(d) With respect to the representative of a class, there was such a substantial divergence of

interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked; or

(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

(2) A person who has litigated on his own behalf in a previous action is not bound by or entitled to the benefits of a judgment in a subsequent action concerning the same claim that is brought or defended by a party representing him.

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into as of August 25, 1992 by and among Glen E. Keller, Jr., Trustee for the liquidation of the business of Blinder, Robinson & Co., Inc. ("Trustee"), Meyer Blinder ("M. Blinder"), Lillian Blinder ("L. Blinder"), The Lillian Blinder Trust, a Colorado trust of which L. Blinder is the sole trustee ("Trust") (L. Blinder and Trust being referred to as "L. B. Trust") and Redmey Management Co., a Colorado corporation dissolved on January 2, 1992, acting through its last acting directors, and also a d/b/a of M. Blinder and L. Blinder ("Redmey") (collectively, M. Blinder, L. B. Trust and Redmey being referred to herein as "Defendants"). As used herein, this "Agreement" includes the exhibits, documents and agreements being executed and delivered pursuant hereto. Trustee and Defendants are referred to herein as the "Parties."

RECITALS

A. On August 1, 1990, the United States District Court for the District of Colorado entered an order (the "Liquidation Order") in *Securities Investor Protection Corporation v. Blinder, Robinson & Co., Inc.*, Civil Action No. 90-Z-1354, placing Blinder, Robinson & Co., Inc. ("Blinder Robinson") in liquidation under the provisions of the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.*, and appointing Glen E. Keller, Jr., as Trustee for the liquidation of the business of Blinder Robinson.

* * *

5. The validity of the Bankruptcy Court's order prior to commencement of the trial of the first Action to grant the motion to withdraw of counsel for IEI and denying IEI's request for a continuance;

6. Any determination that Blinder Robinson is the alter ego of any other person or entity except IEI.

J. Defendants desire, nevertheless, to put an end to their disputes with the Trustee and to pursue other matters.

K. Trustee and Defendants have agreed that it is in their respective best interests to enter into this Agreement and to settle and resolve expeditiously all outstanding claims and differences among them in the Actions upon the terms and in the manner set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and of the mutual agreements set forth below, it is agreed as follows:

1. *M. Blinder, L. B. Trust and Redmey Transfer of Assets.* M. Blinder and Redmey hereby agree to convey, transfer, assign and deliver to Trustee all their respective right, title and interest (legal or equitable) in and to all property, real and personal, tangible and intangible, wherever located and by whomever held, and all property rights and choses in action owned or held by them legally or beneficially on December 30, 1991 or acquired after December 30, 1991 and on or prior to the Closing Date. M. Blinder shall not retain any assets whatsoever. L.

B. Trust hereby agrees to convey, transfer, assign and deliver to Trustee all its respective right, title and interest (legal or equitable) in and to all property, real and personal, tangible and intangible, wherever located and by whomever held, and all property rights and choses in action (other than the "Excluded Assets," as defined below), owned or held by it legally or beneficially on December 30, 1991 or acquired after December 30, 1991 and on or prior to the Closing Date. "Closing Date" as used in this Agreement shall be the latest to occur of (i) approval of this Agreement by the Bankruptcy Court pursuant to Paragraph 9 below, and approval by the United States District Court for the Eastern District of Pennsylvania and/or United States Court of Appeals for the Third Circuit ("Pennsylvania Court") of certain parts of the settlement evidenced by this Agreement, as provided in Paragraph 10 below, and (ii) completion by Defendants of the effective transfer of all of the assets required to be transferred hereunder to Trustee.

The property rights and other assets transferred to Trustee pursuant to this Agreement shall include, but shall not be limited to, those assets listed in Exhibit A to this Agreement.

2. *Excluded Assets.* The L. B. Trust shall retain all assets specifically identified in Exhibit B hereto (the "Excluded Assets"), subject to adjustment pursuant to Paragraph 3(a) of this Agreement and the other limitations contained in this Agreement, and the L. B. Trust shall transfer

* * *

Defendants, wherever located, and to institute suit on any Unasserted Claim. Any statute of limitations applicable to any such claim is tolled for so long as this Agreement remains in effect, and Defendants expressly waive any defenses to any such claims based on the passage of time, including without limitation any statute of limitation, laches, or failure to prosecute.

d. Defendants, any corporation, partnership, or other entity in which any one or more of them hold 10% or more of the voting stock or other equity interest or is a general partner (the "Related Entities"), and the respective heirs, representatives, successors, and assigns of Defendants and the Related Entities, hereby release and forever discharge Trustee and his respective agents, servants, insurers, employees, attorneys, accountants, consultants, and representatives (the "Trustee Group") from any and all claims, actions, causes of action, suits, controversies, demands, covenants, contracts, or promises whatsoever, asserted or unasserted, known or unknown, that Defendants, the Related Entities, or any one of them ever had or now has or that any of them hereafter can, shall, or may have for or by reason of any cause, matter, or thing whatsoever occurring or arising prior to the date of execution of this Agreement, including without limitation any counterclaim or claim that was or could have been asserted in the Actions, any customer or creditor claim filed by any of Defendants or the Related Entities in connection with the liquidation of the business of Blinder Robinson and any claim based upon, arising out of or related to the liquidation of the business of Blinder Robinson or any actions of the Trustee Group in connection with the liquidation of the business of Blinder Robinson

or the filing or conduct of any related litigation or proceedings by or on behalf of Trustee ("Defendants' Claims"); *provided*, that this Paragraph 7 shall not operate to release or discharge any claim arising under this Agreement. Defendants, the Related Entities, and each of them, covenant that none of Defendants' Claims has been assigned or transferred, in whole or in part, to any person not bound by this Agreement.

5. *Full and Accurate Disclosure.* Defendants represent and warrant that the assets listed in Exhibits A, B, and C to this Agreement represent all assets owned legally or beneficially by Defendants as of December 30, 1991, and from that date to the date of this Agreement. If the Trustee discovers, not later than fifty-four (54) weeks after the Closing Date, that there has been any material misrepresentation in this Paragraph 8, then the Trustee shall no longer be barred by the provisions of Paragraph 4 and may proceed immediately to execute on or enforce the First, Second, and Third Judgments on any assets of defendants wherever located and by whomever held.

6. *Verification of Information.* By entering into this Agreement, Defendants waive all applicable privileges and authorize all of their respective present and former employees, lawyers, accountants, bankers, and financial advisors of any kind to cooperate with the Trustee and to provide all information, records, and documents to the Trustee in connection with verification by the Trustee that Defendants have fully

* * *

18. *Severability.* If any provision, or portion thereof, of this Agreement is held invalid, illegal, void, or

unenforceable by reason of any law, rule or regulation, administrative order, judicial decision, or public policy, all other provisions of this Agreement shall nevertheless remain in full force and effect.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the day and year first above written.

APPROVED:

DAVIS, GRAHAM & STUBBS

By /s/ William A. Bianco
Counsel for Glen E. Keller, Jr., Trustee

GLEN E. KELLER, JR., Trustee

/s/ Glen E. Keller, Jr.

HOWARD FRANKLIN CERNY

/s/ Howard Franklin Cerny
Attorney for Meyer Blinder and Redmey Management Co.

/s/ Meyer Blinder
Meyer Blinder

JOHN A. BERMAN

/s/ John A. Berman
Attorney for Lillian Blinder and The Lillian Blinder Trust

/s/ Lillian Blinder
Lillian Blinder

LILLIAN BLINDER TRUST

By Lillian Blinder Trustee
Lillian Blinder, Trustee

PROOF OF CLAIM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

IN RE:	Adversary Proceeding No. 90-1170 SBB SIPA
BLINDER, ROBINSON & Co., INC.,	Amount of Claim $5,453.56
Debtor.	Claimed As:
	___General Unsecured
	___priority (see Paragraph 10)
	___Secured (see Paragraph 9)

1. Name of Creditor: Meyer & Lillian Blinder DBA Redmey Management
   (Print or Type)
   Mailing Address: 6455 S. Yosemite St.
   Englewood, CO 80111
   City State Zip Code

2. The debtor was, at July 30, 1990, and still is indebted (or liable) to this claimant in the sum of $5,453.56

3. The consideration for this debt (or ground of liability) is as follows: See attached

4. (If the claim is founded on writing.) The writing on which this claim is founded (or a duplicate thereof) is attached hereto (or cannot be attached for the reason set forth in the following statement). See attached

5. (If appropriate.) This claim is founded on an open account, which became (or will become) due on ___, as shown by the itemized statement attached hereto. unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it. See attached

6. No judgment has been rendered on the claim except:
N/A

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.
N/A

8. The claim is not subject to any set-off or counterclaim except:
N/A

9. No security interest is held for this claim except: Provisions under original lease agreement, see attached.

(If security interest in property of the debtor is claimed.) The undersigned claims the security interest under the writing referred to in paragraph 4 hereof. Evidence of perfection of such security interest is also attached hereto.

10. This claim is an unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. It is not

entitled to priority unless the reason for priority and the amount claimed as priority is set forth below.

11. If claimant has obtained this claim by assignment, a copy or explanation of said assignment is attached hereto.

Name of Creditor	Meyer & Lillian Blinder, DBA Redmey Management (Print or Type)
Signature	/s/ Meyer Blinder Meyer Blinder
Title (Corporate Officer, Partner, or Agent)	Owner

IT IS A VIOLATION OF FEDERAL LAW TO FILE A FRAUDULENT CLAIM CONVICTION CAN RESULT IN A FINE OF NOT MORE THAN $50,000 OR IMPRISONMENT FOR NOT MORE THAN 5 YEARS OR BOTH.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEYER BLINDER, Appellant-Defendant, v. DAN and LOUISE HOXWORTH, et al., Appellee-Plaintiffs.	)	U.S.C.A. No. 94-1508 U.S.D.C. No. 93-C-1260

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO
HONORABLE JAMES R. CARRIGAN, DISTRICT JUDGE

APPELLANT'S OPENING BRIEF

JOHN FOGERTY WINSTON
Attorney at Law
5300 DTC Parkway, Suite 300
Englewood, Colorado 80111
(303) 770-2032

Attorney for Appellant

Statement of Counsel Pursuant to 10th Cir. R. 28.2(f) Re: Oral Argument

It appears that the district court was confused during oral argument over the relevancy of multiple judgments, injunctions and settlements underlying the parties' claims. The legal concepts controlling resolution of this

appeal are intellectually complex and oral argument may materially assert the Court in ruling on this appeal to resolve unforeseen questions which may likely arise as a consequence of that complexity.

* * *

judgment by a district court and accordingly the issues raised which concern the district court's jurisdiction to enter declaratory relief are questions of law which are reviewed under the de novo standard. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993).

SUMMARY OF ARGUMENT

The federal district court is barred by the doctrine of *res judicata* from assuming jurisdiction to modify the provisions of final bankruptcy settlements, where the parties to the settlements and declaratory judgment proceedings are identical, and where the parties seek relief in the form of a declaratory judgment modifying their share of an identical pool of assets.

1. Res Judicata Under *res judicata* or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the prior action. *Northern Natural Gas v. Grounds*, 931 F.2d 678, 681 (10th Cir. 1991). A claim is barred by *res judicata* if three elements exist. 1) a final judgment on the merits in the prior suit; 2) the prior suit involved *identical claims* in the present suit; and 3) the prior suit involved the same parties or their privies. (emphasis supplied) *Id.* at p. 682.

2. In Personam, In Rem & Quasi in Rem Jurisdiction

a) In Personam Jurisdiction

In Personam Jurisdiction is "the power which a court has over the defendant himself in contrast to the court's power over the defendant's interest in property (quasi-in-rem) or power over the property itself (in rem). A court which lacks personal jurisdiction is without power to issue an in personam judgment. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565." HENRY CAMPBELL BLACK, ET AL., BLACK'S LAW DICTIONARY, 791 (5th Ed., 1990)

b) In rem

* * *

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re BLINDER, ROBINSON & CO., INC., Debtor.	))))))	Adversary Proceeding No. 90-1170-SBB (SIPA)

OBJECTION TO TRUSTEE'S VERIFIED MOTION TO APPROVE SETTLEMENT OF ADVERSARY PROCEEDINGS AGAINST MEYER BLINDER, LILLIAN BLINDER AND INTERCONTINENTAL ENTERPRISES, INC.

AND

REQUEST FOR HEARING
(Filed Aug. 20, 1992)

Dan H. Hoxworth, et al. ("Hoxworth"), the largest claimant in the Blinder, Robinson & Co., Inc. bankruptcy hereby objects to Trustee's Verified Motion to Approve Settlement of Adversary Proceedings Against Meyer Blinder, Lillian Blinder and Intercontinental Enterprises, Inc. and requests a hearing on the Trustee's motion and this objection. The bases for the objection is as follows:

1. All Of The Terms of the Settlement Have Not Been Disclosed. The Settlement Agreement Has Not Even Been Drafted.

Counsel for Hoxworth have been told by the Trustee's counsel that there is no written settlement agreement. Even the Trustee himself does not know the terms of the settlement he asks the court to approve.

2. The Trustee is Prohibited by Court Order From Completing the Settlement.

An injunction entered by the United States District Court for the Eastern District of Pennsylvania specifically prohibits Meyer Blinder and IEI from transferring assets to the Trustee, and the injunction order has been interpreted by the United States District Court for the District of Colorado as prohibiting the Trustee from taking any action with regard to the assets of Meyer Blinder and IEI. A copy of the Order entered by Honorable Robert F. Kelly, U.S. District Judge, United States District Court for the Eastern District of Pennsylvania is attached hereto as Exhibit A, and the Order on Motion for Stay by Honorable John L. Kane, United States Senior District Court Judge, United States District Court for District of Colorado, is attached hereto as Exhibit B.

The Trustee has petitioned the United States Court of Appeals for the Third Circuit for relief from the Order, but the relief has not been granted.

3. The Trustee Has Failed To Disclose Two Conditions To The Settlement Condition That The Court Cannot Satisfy.

Based on verbal admission by the Trustee and his counsel to counsel for Hoxworth, Hoxworth admits that the settlement is subject to the two following conditions, and that the Trustee cannot satisfy the conditions: (a) the Trustee obtaining the satisfaction of Hoxworth's $73 million judgment against Meyer Blinder and $70 million judgment against IEI; and (2) the Trustee obtaining a

waiver by the SEC of its monetary claim against Meyer Blinder.

4. The Settlement Is Not In The Best Interests Of The Estate.

Although the information provided by the Trustee fails to clearly disclose it, the settlement would leave Meyer Blinder with more than $2.0 in assets. The Trustee has asserted in various courts that it is almost a certainty that his judgments will be affirmed on appeals. There is therefore no justification for a settlement that leaves Meyer Blinder a multi-millionaire while the creditors of the bankrupt corporation are paid only a small portion of their claims.

5. The Notice To The Creditors and Other Parties to the Bankruptcy Proceedings is Inadequate.

By failing to advise the creditors and other interested parties to the bankruptcy proceedings of the matters set forth in paragraphs 1-5 above, the Trustee has failed to provide information with which the creditors an other interested parties can decide whether or not to object to the settlement.

WHEREFORE, Hoxworth prays that the Court deny the Trustee's motion.

Respectfully submitted,

MILLER FAUCHER CHERTOW CAFFERTY AND WEXLER

By: /s/ J. Dennis Faucher
J. Dennis Faucher
Marvin A. Miller
Ellen Meriwether
One Penn Square West
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Stephen A. Whinston
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1622 Locust Street
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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAN H. HOXWORTH, named: Dan Hoxworth; LOUISE A. HOXWORTH, named; Louise Hoxworth, individually and on behalf of the Hoxworth Class,	)	
Plaintiffs/Counter-Defendants/Appellees,	)	
v.	)	No. 94-1474
LILLIAN BLINDER; LILLIAN BLINDER TRUST,	)	
Defendants/Cross-Claimants/Appellants,	)	
and	)	
MEYER BLINDER; DONALD L. WALFORD; WALFORD DEMARET & COMPANY, INC.; BRADFORD BOLTON, Clerk, United States Bankruptcy Court for the District of Colorado,	)	
Defendants.	)	

PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING EN BANC

John Richilano
JOHN M. RICHILANO P.C.
1660 Wynkoop Street,
Suite 1160
Denver, Colorado 80202
(303) 893-8000

John A. Berman
1660 Lincoln Street
Suite 1700
Denver, Colorado 80264
(303) 832-7645

Attorneys for Appellant Lillian Blinder

* * *

c. Whether the doctrine of finality as it applies to bankruptcy court settlements has been significantly altered by the panel's opinion, such that bankruptcy courts, trustees, creditors and parties will no longer be able to rely on the finality of bankruptcy court settlements.

ARGUMENT

I. THE PANEL DECISION FINDING THE HOXWORTH CLASS NOT IN PRIVITY WITH THE TRUSTEE IS CONTRARY TO SUPREME COURT AND 10TH CIRCUIT PRECEDENT.

A. Since the Hoxworth Class as Creditor of the Estate Was in Privity With the trustee, the Hoxworth Class as Creditor of Meyer Blinder Was Also in Privity Because the Class Was One and the Same Entity and Did Not Appear in Different Capacities.

The panel decision correctly concluded that Appellants satisfied two of the three elements of *res judicata*. The Blinder Settlement was a final judgment on the merits, and involved a claim identical to the Hoxworth action. Slip Op. at 7 (a copy of the complete Slip Opinion is attached). However, the panel held that the third element, identity of parties *or* their privities, was not met. *Id.* This is contrary to established precedent of the United States Supreme Court and the 10th Circuit.

The panel decision notes, "we cannot conclude the third element of *res judicata* is met because the Hoxworth Class was not in privity of interest with the trustee." *Id.* The panel decision ignores the fact that the Hoxworth Class was a *party* to the Blinder Settlement. Thus, whether the class was in *privity* with the trustee is unnecessary to resolve. A party is a party, regardless of which hat it might be wearing.[1]

In *Allen v. McCurry*, 449 U.S. 10, 101 S.Ct. 411, 66 L.Ed. 2308 (1980), the Supreme Court held that "[u]nder *res judicata*, a final judgment on the merits of an action precludes the parties *or* their privies, from litigating issues that were or could have been raised in that action." 449 U.S. at 94 (emphases supplied). *See also, Statsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1471 (10th Cir. 1993), and Restatement (Second) of Judgments §34. The panel erred in jumping to the issue of privity, which assumes the litigant to be precluded is a *nonparty* to the prior action, without addressing the unalterable fact that the Hoxworth Class *was* a party to the prior action – the Blinder Settlement.

The panel decision relied upon §42(1)(d) of the Restatement, Exceptions to the General Rule of Representation. Slip Op. at 8. However, the panel had *already* ruled that the Hoxworth Class was in privity with the trustee. *Id.* The flaw in the panel's reasoning is according the Hoxworth Class as creditor of the estate a different status from the Hoxworth Class as creditor of Meyer Blinder. As

---

[1] The Hoxworth Class does not contend, and the panel did not hold, that the *res judicata* is defeated because the Class appeared in different *capacities*. *See* below.

parties they were and are one and the same. The Hoxworth Class has not argued, and the panel decision does not hold, that the class appeared in different legal *capacities. Cf.* Restatement (Second) of

* * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEYER BLINDER, Appellant-Defendant, v. DAN and LOUISE HOXWORTH, et al., Appellee-Plaintiffs,	)))))))	U.S.C.A. No. 94-1508 U.S.D.C. No. 93-C-1260

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
HONORABLE JAMES R. CARRIGAN, DISTRICT JUDGE

APPELLANT MEYER BLINDER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

JOHN FOGERTY WINSTON
Attorney at Law
5655 South Yosemite Street
Suite 105
Greenwood Village, Colorado
80111
(303) 770-2032

Attorney for Appellant

* * *

b. Whether the doctrine of privity in the context of res judicata applies only to persons who are *not* parties to a proceeding.

c. Whether the Circuit's own precedent included an analysis of *both* party and privity status as contrasted with the panel's ruling thereby causing the panel to overrule its own Circuit's precedent.

I. ARGUMENT

A. The panel's neglect to address the issues raised on appeal resulted in an opinion which did not address all issues, is cause for remand from a higher court, and destabilizes res judicata law in this circuit until the Court addresses all issues raised.

As stated in the Suggestion for Rehearing In Banc, the panel has neglected to conduct a complete *de novo* review of the facts raised on appeal and apply the facts to the law in this case. Appellant submitted an argument that three legal premises supported by the facts required the court to make a conclusion that the declaratory judgment being appealed could not have been entered *ab initio* because it was barred by the claim preclusion doctrine of res judicata.

The three legal premises supported by the facts are that the [sic] prior to the entry of the declaratory judgment being appealed, a final judgment on the merits was rendered (Premise 1) over an identical cause of action (Premise 2) between the same parties (Premise 3) and therefore barred entry of a subsequent final judgment on the merits affecting the terms of the first judgment (res judicata). (Appellant's Opening Brief pp. 8, 9). *Brown, supra,* at 131; *Satsky, supra,* at 1467.

Since Mr. Blinder's argument that the Hoxworth plaintiffs were parties has not been addressed by the panel there can be no final ruling on the appeal raised by appellant until such time as the argument is recognized and ruled upon.

The panel found that Premise 1 and 2 had been established. (Opinion at p. 7, paras. 2 and 3) The panel acknowledged that Premise 3 is part of the syllogism for res judicata. (Opinion at p. 7, para. 2) The panel erroneously stated that appellant relied upon fourth premise which applies res judicata to privies. (Opinion at p. 6, § II.) Appellant is entitled to a ruling on whether the panel recognizes that Premise 3 has been advocated by Mr. Blinder and proved or whether the panel has found some legal precedent authorizing its removal from the centuries old legal syllogism which supports res judicata. Without such precedent the opinion as written overrules existing precedent from the Tenth Circuit and from the United States Supreme Court by eliminating consideration of that element during the course of a de novo review where sufficient facts were before the court from which it conclude [sic] that Premise 3 was either supported or refuted by the facts.

In *Satsky, supra,* the court addressed the issue of whether the parties to the second suit were parties to the first suit *before* engaging in a privity analysis.

> Res judicata is *applicable* only *to parties* to the first suit or their privies. *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1280 (10th Cir.1989) (citing *Allen v. McCurry*, 449 U.S. at 94, 101 S.Ct. at 414. Since plaintiffs *were not parties of record* in *Paramount 1, we must determine if privity*

> *exists* between the State of Colorado and plaintiffs.

Satsky, supra at p. 1468.

This panel's method of analysis is inconsistent with the *Satsky* court and all other published law on the subject due to its failure to address the party status of the plaintiffs in the second suit as it related to that status in the first suit. The analysis is incongruous with prior appeal practices in this circuit because it overrules a prior methodology employed by the circuit without any legal authority supporting its new methodology.

By failing to address Premise 3 and by not acknowledging that it is a central issue in Mr. Blinder's appeal, the panel also forces Mr. Blinder to either request reconsideration or seek review by the United States Supreme Court by way of a Petition for Certiorari or by way of a Petition for Mandamus/Prohibition. In the event either of the former remedies are allowed, it appears likely that the case will be remanded for a finding addressing whether the Hoxworth plaintiffs were parties to the first proceeding.

The opinion of the panel creates difficulties beyond appearing to violate stare decisis. The longer it takes to obtain a ruling on the argument raised by Mr. Blinder, the greater the risk is of destabilizing the law controlling pending and future appeals on the issue of res judicata. Such a result unduly burdens judicial economy and contains a potential for generating inconsistent and contradictory results in other appeals thereby prolonging litigation. The opinion also serves as a disincentive to

settlement of claims while the law remains unstable in this circuit.

B. The existing res judicata syllogism reflected in controlling precedent and as applied in the Restatement (Second) of Judgments has been modified by the panel in violation of precedent.

1) Application of Res Judicata Under Restatement (Second) of Judgments § 34(1) and (2)

Although the panel did not expressly address whether the Hoxworth plaintiffs were parties, it concluded they were privies not bound by a former judgment. The panel relied upon the Restatement (Second) of Judgments (1980), to support its conclusions. However, the Restatement in inconsistent with those conclusions as shown below:

> The Restatement provides as follows:
>
> § 34 *Parties* to an Action
>
> (1) A person who is named as a party to an action and subjected to jurisdiction of the court is a party to the action.
>
> (2) A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party, except as stated in §§ 30-32 in this Chapter. . . . [1]

---

[1] The exceptions set forth in § 34(2) have not been argued in this case nor advanced as a cause for excepting the Hoxworth plaintiffs from the application of § 34(1).

Comment:

a. *Rationale.* The opportunity to litigate is accorded to persons who are parties. *A person becomes a party to an action by being designated as such and becoming subject to the jurisdiction of the court.* A plaintiff subjects himself to jurisdiction of the court by commencing the action. *Other parties may subject themselves to the court's jurisdiction by making an appearance or participating in the action in a manner that has the effect of an appearance.*

Restatement (Second) of Judgments, § 34(1)(2) (1980).

The panel provides abundant conclusions of fact to support the conclusion that the Hoxworth plaintiffs were parties for purposes of § 34(1) and are bound by res judicata by § 34(2).

> the Hoxworth Class filed an unsecured proof of claim against the . . . estate. (Opinion at p. 5, para. 2)
>
> the Hoxworth plaintiffs, *creditors* of the estate, *appealed* the bankruptcy court's approval of the . . . Blinder Settlement because the terms were not in the interest of the estate and its *creditors.* (Opinion at p. 5, para. 3)
>
> The Hoxworth Class agreed to dismiss its appeal of the Blinder Settlement and to modify an injunction the Pennsylvania court had placed over Meyer Blinder's assets to allow the trustee to proceed with the Blinder Settlement. (Opinion at p. 6, para. 1)
>
> Until the Hoxworth settlement was reached, the trustee and the Hoxworth Class were in a standoff – each party enjoined from enforcing their

> respective judgment over the Blinder assets. (Opinion at p. 8, para. 2)

These statements are drawn from facts in the record which show that the Hoxworth plaintiffs entered an appearance in the bankruptcy proceeding, appealed the bankruptcy settlement in the first proceeding, and were involved in litigation prior to that time seeking to enforce a judgment against the identical assets claimed by the trustee in the first proceeding. Under these circumstances it is obvious that Hoxworth plaintiffs went beyond *participating in the action in a manner that had the effect of an appearing* and conclusively demonstrates that they availed themselves of all rights available to parties in attempting to prevent court approval of the first judgment on the merits, the Blinder settlement.

Case law *supplied by Mr. Blinder in his Reply Brief* further supports the conclusion that the Hoxworth plaintiffs were parties for purposes of § 34(1) and (2) of the Restatement.

> If a nonparty *either participated vicariously* in the original litigation by exercising control over a named party *or had the opportunity to exert control,* then the nonparty effectively enjoyed his day in court, and *it is appropriate to impute to him the legal attributes of party status* for purposes of claim preclusion. (citations omitted).

Gonzales v. Banco Cent. Corp., 27 F.3d 751, at 758 (1st Cir. 1994).

While the Hoxworth plaintiffs may claim they have participated vicariously in the first judgment vis-a-vis their relationship with a trustee, they both had the opportunity to exercise control over the trustee by objecting to

the settlement and exercised control over the trustee by obtaining an injunction against him, appealing the settlement, dropping the appeal, and entering into their own settlement regarding the identical subject matter. In later reaching their own settlement they also dropped an injunction against the trustee which they had obtained *as parites* to prevent him from claiming that Mr. Blinder's assets belonged to them and not the trustee, as against the trustee's cross-injunction preventing them from using Mr. Blinder's assets to satisfy their claim. According to the Restatement and the U.S. Supreme Court, it is therefore proper to impute to the Hoxworth plaintiffs the legal attributes of party status for purposes of claim preclusion.

2) Misapplication of Facts to Restatement (Second) of Judgments § 42(1)(d).

§ 42(1)(d) of the Restatement of Judgments is an exception to the application of § 41(1)(a) and (b), and § 41(2) of the Restatement which provides as follows:

§ 41. Person Represented by a Party.

(1) A person *who is not a party* to an action *but who is represented by a party* is *bound* by and entitled to the benefits of a judgment as though he were party. *A person is represented by a party who is:*

(a) *The trustee of an estate or interest of which the person is a beneficiary; or . . .*

(b) *Invested by the person with authority to represent him in an action; or . . .*

> (2) A *person represented by a party* is *bound* by the judgment *even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.*
>
> *Exceptions to this general rule are stated in § 42.* (emphasis supplied)

Under the facts of this case, the Hoxworth plaintiffs were represented by a trustee of an estate, but were also invested *by themselves* with the authority to *represent themselves* and did represent themselves in the actions against him over the ownership of the same assets subject to the judgment. They were parties.

Subsection (2) implies that Section 41 was designed to bar non-parties who were represented by a party but had no notice of the action in which he represented their interests, had not been served with process, or were not subject to service of process. The opposite of each of those premises is true here.

The Court did not employ an analysis of § 41(1) and (2) but nonetheless applied an exception to that section set forth in § 42(1)(d).

The Court relies on § 42(1)(d) of the Restatement wherein it states:

> According to the Restatement (Second) of Judgments, "[a] *person* is not bound by a judgment for or against a party who purports to represent him if . . . [w]ith respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class . . . that he could not fairly represent them

> with respect to the matters as to which the judgment is subsequently invoked. . . .

Restatement (Second) of Judgment § 42(1)(d), (1980)

Whether the trustee purported to represent the Hoxworth plaintiffs or could fairly represent them is not a question for consideration where they were already directly representing themselves in the same matter by contesting his ability to confiscate the settlement assets and by appealing his ability to distribute them.

The *comment* to § 42(1)(d) shows yet another departure by the panel from the authority which it relies upon.

> e. *Divergence of interest within a class.* The *representative authority* of a party *appearing on behalf of a class derives* principally *from* the *identity between his interests and* those of the rest of the members of the described *class.* Where it appears that there is in fact a substantial divergence of interest between then [sic] *assurance is lacking that the representative will effectively represent the class.* . . . In such circumstances the judgment is not binding on those interests which are divergent. (emphasis supplied)

Tha panel articulates a theory that the trustee was a representative of the class wherein the Hoxworth plaintiffs were members, and that because the Hoxworth plaintiffs had a claim against another party with whom the trustee settled, they were not bound by his agreement to settle with another party because assurance was lacking that the trustee would effectively represent their interests as members of the class. The two illustrations appended to § 42(1)(d) apply to cases where the member did not litigate the claim in the first proceeding, the

representative did not litigate the claim in the first proceeding *and* the claim was not in the representative's interest. In both examples the members were allowed to litigate the claims not raised in the prior proceeding in a second proceeding for the first time.

§ 34(1) and (2) of the Restatement makes the Hoxworth plaintiffs parties to the settlement agreement. § 42(1)(d) allows an exception res judicata for non-parties where their representative will not represent the interest of the members, those interests are *unprotected* in the first proceeding, and the interests not represented in the first proceeding by the member. By appearing and contesting the issues in the first proceeding, the Hoxworth plaintiffs were parties under § 34(1) and (2) and not entitled to the exception set forth in § 42(1)(d).

C. The Panel's Opinion Materially Alters Existing Legal Syllogisms Controlling the Application of Res Judicata.

The use of symbolic logic helps simply the forgoing analysis by identifying the legal syllogisms on the same subject and show their modification or misapplication in the panel's ruling.

1. *Syllogism 1 – Res Judicata*

Where A = a judgment on the merits

B = resolving an identical claim or cause of action

C = between same parties

D = or their privies

E = the parties are barred from litigating the claim a second time

Then If A is true, AND B is true AND C is true, E is true OR

* * *